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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

FRANK B. HALL & CO. INC.,
FRANK B. HALL & CO. INC. OF TEXAS
AND FRANK B. HALL & CO.,
Petitioners,

v.

LARRY W. BUCK,
Respondent.

On Writ Of Certiorari To The Fourteenth Supreme Judicial District Court Of Appeals Of The State Of Texas

PETITION FOR A WRIT OF CERTIORARI TO THE FOURTEENTH SUPREME JUDICIAL DISTRICT COURT OF APPEALS OF THE STATE OF TEXAS

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QUESTIONS PRESENTED FOR REVIEW

I. Do the First and Fourteenth Amendments to the Constitution require that the burden of proof be on the Plaintiff to prove falsity in a defamation case?

II. Do the First and Fourteenth Amendments to the Constitution require an appellate court to make an independent review of all of the evidence on actual malice in a libel and slander case against a non-media defendant where punitive damages are awarded?

III. Do the First and Fourteenth Amendments to the Constitution allow a finding of actual malice based on ill will coupled with other evidence which alone is insufficient, of itself, to establish actual malice?

IV. After an independent review, is the evidence in this case insufficient to support a finding of actual malice?

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OPINION BELOW

The order and opinion of the Fourteenth Supreme Judicial District Court of Appeals of the State of Texas is reported at 678 S.W.2d 612. It is reprinted in the Appendix at A1-A34.

The refusal of the Petitioners' application for writ of error by the Supreme Court of the State of Texas is not reported. It is reprinted in the Appendix at B1. The

overruling of Petitioners' Motion for Rehearing of Petitioners' application for writ of error by the Supreme Court of the State of Texas is unreported. It is reprinted in the Appendix at C1.

GROUNDS ON WHICH THIS COURT'S JURISDICTION IS INVOKED

Petitioners seek issuance of a writ of certiorari to review an order and opinion of the Fourteenth Supreme Judicial District Court of Appeals of the State of Texas dated and entered July 26, 1984. Thereafter, Petitioners' Motion for Rehearing of said order was denied on September 13, 1984. Petitioners filed an application for writ of error in the Supreme Court of the State of Texas which was refused with the notation no reversible error, on December 12, 1984. On January 23, 1985, the Supreme Court of the State of Texas overruled Petitioners' Motion for Rehearing of the application for writ of error. The jurisdiction of this Honorable Court is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Const. amend. I, which provides in pertinent part:

> Congress shall make no law . . . abridging the freedom of speech . . . .

U.S. Const. amend. XIV, § 1, cl. 2:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States: nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

This is a case brought by Respondent, Larry W. Buck ("Buck") against Frank B. Hall & Co. Inc., Frank B. Hall & Co. Inc. of Texas and Frank B. Hall & Co. (collectively referred to as "Hall"), Petitioners herein.[1] Trial was to a jury in a state court of Texas which found in favor of Buck on breach of contract, slander and libel issues. The jury returned a verdict for Buck in the amount of $479,000 actual damages for breach of contract and $605,000 for slander and libel. In addition, the jury awarded punitive damages of $1,300,000 and attorney's fees.

I.

THE FACTS

Hall, an insurance broker and agent, hired Buck in June, 1976 as an insurance salesman to produce new business for Hall's Houston office. Shortly before Buck

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1. Frank B. Hall & Co. Inc. of Texas is a wholly owned subsidiary of F. B. Hall & Co. Brokerage Inc., which is a wholly owned subsidiary of Frank B. Hall & Co. Inc. The non-wholly owned subsidiaries of Frank B. Hall & Co. Inc. or its subsidiaries are Frank B. Hall Overseas Ltd. (Hellas); Malatier & Frank B. Hall, S.A.; Frank B. Hall Iberia, S.A.; Frank B. Hall (Malaysia) SDN. BHD.; Frank B. Hall of Korea, Inc.; RAMRO y Esociados, S.C.; Inmobiliaria Ramos Rosado, S.A. de C.V.; Ramos Rosado y Esociados Agente de Seguros, S.A. de C.V.; M. W. Joost & Frank B. Hall g.mbh; Frank B. Hall Reinsurance (Afro-Asia) S.A.; P. T. Bimantara Graha Insurance Brokers; Assurances Verspieren S.A.R.L.; Razybowski, S.A.R.L.; Consultores de Seguros, Ltda.; Frank B. Hall Insurance Brokers Singapore Private Limited; Idrissi Holdings Limited SARL; Commercial Services Company Ltd.; B. I. Davis y Cia S.A.; Leslie-Hall PBCO Ltd.; Frank B. Hall R. de Mexico, S.A.; Reaseguros Corsa, S.A.; Euro-American Reinsurance Management Co. SRL; Arab-Resources Insurance Company Ltd.; MacDonagh & Boland Group Limited; Leslie & Godwin (Ireland) Ltd.; Leslie & Godwin (Underwriting) Ltd.; R.A.F. MacMillan & Co. Ltd.; Steetley Leslie & Godwin Ltd.; Inniziative e Partecipazioni Assicurtive Bruno Storni S.p.A.; Frank B. Hall Italia, S.p.A.; Anscor Insurance Brokers, Inc.; Lloyd Paulista Gorretagens De Seguros E Administracao S. A.

came to Hall, Hall hired Lester Eckert ("Eckert"), who had worked with Buck at Alexander & Alexander ("A & A"), a Hall competitor. Hall later appointed Eckert manager of its Houston office with Buck as one of his subordinates.

Mendel Kaliff ("Kaliff"), the Hall Regional Manager, became dissatisfied with Buck's sales production and reduced his pay during October, 1976 and in March, 1977 discharged him. Buck consulted counsel who retained Lloyd Barber ("Barber"), a private investigator.

Barber, falsely stating that Buck was being considered for a position of responsibility and trust, interviewed Kaliff, Eckert and Virginia Hilley, the Vice-President of Administration of Hall's Houston office ("Hilley"), and surreptitiously tape-recorded the interviews. Buck then sued Hall for defamation and breach of contract.

II.

THE PROCEEDINGS BELOW

At trial, Buck sought damages for defamation based upon sixteen oral statements and one handwritten note. Thirteen of the slanderous statements were those tape-recorded by Buck's private investigator, Barber. Two other statements attributed to Eckert were that he told a Hall officer (while Buck was a Hall employee) that Buck was a crook and that he later told Warren Johnson that he felt Buck was a crook. Buck also claimed that Eckert defamed him by refusing to expand on his statement to a prospective employer of Buck that Buck was terminated for lack of sales production.

The libel is based on a note written by Hilley which was attached to a box of documents offered as evidence at trial by Hall. The court allowed a trial amendment to

enable Buck to add an action based upon the note. The note states "files brought by Larry Buck to Frank B. Hall & Co. when he joined the firm 6-76—they have been retained in case there is a need for them as evidence in lawsuit pending."

The jury found that each of the above statements was made with malice. The jury instructions defined malice as follows:

> A statement is made with "malice" if it is made with knowledge that it is false or the reckless disregard of whether it was false or not.

The jury was asked to determine whether each of the above statements was "substantially true." Prior to the submission of the Special Issues to the jury, Petitioners, believing the burden was on Buck to prove falsity, requested the Court to submit the following to the jury:

> Do you find from a preponderance of the evidence such statement referred to in Special Issue No. _____ was substantially false and untrue?

The trial court refused to submit that requested Special Issue. After the verdict, Hall timely filed its Amended Motion to Disregard the Findings on Special Issues and Amended Motion for Judgment Notwithstanding the Verdict in which Hall stated that there was no evidence that the statements in question were made with malice. Hall also timely filed its Motion for New Trial in which Hall asserted that the trial court incorrectly placed the burden of proof by inquiring if the statements were substantially true instead of correctly placing the burden on Buck to prove falsity. All of Hall's post-trial motions were denied by the trial court.

On appeal, the court of appeals affirmed. The court of appeals noted that for many years the Texas courts

have held in defamation actions that truth is an affirmative defense and that the burden of proving truth is on the defendant. In holding that the burden of proof had not shifted to the plaintiff to prove falsity, the court stated:

> In our opinion, the cases relied upon by appellant do not support appellant's contention that Texas law has changed so as to now place on a private defamation plaintiff the burden of proving falsity of the defamatory statements in order to recover damages for libel and slander.
>
> Furthermore, the decisions of the United States Supreme Court in the mid-1970's do not compel the change in Texas law argued by appellant Hall. . . . There has been no decision by the United States Supreme Court holding that in order to prove "fault" of the defendant, the plaintiff must prove falsity of the defamatory statement.

The court further stated that "in our opinion *Gertz* does not imply that the Constitution places on private defamation plaintiffs the burden of proving falsity."

The court also held that there was evidence that sixteen of the seventeen statements were made with malice. The malice findings were particularly significant here because they not only permitted the award of extraordinary punitive damages but also because they were found to overcome the qualified privileges which legitimately protect statements by employers. In so holding, the court noted that malice has been equated with a want of good faith. The court further stated:

> While evidence of ill will alone is not enough to establish malice, proof that the defendant entertained ill will toward the plaintiff is probative evidence that the defendant published the information either knowing of its falsity or with reckless disregard for its

> truth or falsity. . . . Thus, when coupled with other evidence, proof of ill will may furnish a sufficient basis for a jury's finding of malice.

After so stating, the court examined whether there was evidence of malice. A review of the appellate court's opinion demonstrates that it considered only evidence which would uphold the malice findings and nowhere made an independent evaluation of all the evidence, including that presented by Hall, to determine whether there was evidence of malice. Furthermore, the evidence on malice which was relied upon by the court was constitutionally insufficient to support the malice findings.

Most of the statements in question were made by Eckert. In upholding the finding of malice as to each of the statements made by Eckert, the court listed evidence from which it concluded that the relationship between Eckert and Buck was strained at best. The court did not mention or consider any of the evidence that showed that there was no ill will on the part of Eckert towards Buck. For instance, while the court noted that Eckert had a salary much less than that of Buck, the court did not mention that Eckert testified that he was not bothered by Buck's higher salary and profit-sharing. In addition, the court noted Buck's testimony that Eckert was angered when Buck would not testify as Eckert wished in a lawsuit against Eckert, but the court did not cite Eckert's testimony that he was shocked, but not angry, at Buck's refusal to tell the truth in that lawsuit.

For evidence of Kaliff's malice, the court cited his testimony that a pre-employment character reference check on Buck had revealed nothing derogatory about him. The court referred to Kaliff's admission that Buck's reputation and character were good at the time of trial

and his testimony that his information about Buck was second-hand from Eckert.

The court considered two statements made by Hilley. The first was the handwritten note attached to the box of files and the second was a statement to Barber. The court held there was no evidence that the note was written with malice, but it upheld the malice finding as to the other statement without any discussion.

In upholding the malice findings, the court found it significant that Hall attempted to retain Buck's accounts after his termination and that Hall saved $75,000 in commission and salary to Buck by firing him early.

The court's opinion does not consider the evidence which shows that there was no malice on the part of Hall's employees. For instance, in addition to the statements mentioned above, Eckert affirmatively testified that he did not make any statements about Buck that he believed were not true and stated that he believed Buck did things that were dishonest. There was no evidence whatsoever that the statements by Kaliff and Hilley were made with knowledge of falsity or with reckless disregard of truth or falsity. The court noted that the testimony of Kaliff and Eckert was impeached and that the jury was entitled to believe that

> Eckert harbored animosity toward Buck, that Kaliff attacked Buck's character with serious doubts as to the truth of his accusations, that Hilley entertained serious doubts as to the truth of her assertions and that Hall had self-serving motives for Buck's early termination.

Upon Motion for Rehearing, Hall argued that the burden of proof was on Buck to prove falsity and that

there was no evidence of malice, and urged that the court of appeals had erred in not making an independent review of the record to determine whether there was sufficient evidence of malice. The Motion for Rehearing was overruled and Hall filed its Application for Writ of Error in the Texas Supreme Court. There Hall again asserted that the burden of proof on falsity should be on the plaintiff, that there was no evidence of malice and that the court of appeals erred in failing to conduct an independent review of the record. In both the Motion for Rehearing and the Application for Writ of Error, Hall also asserted that malice may not be based upon evidence of ill will. The Texas Supreme Court denied the Application for Writ of Error and overruled Hall's Motion for Rehearing.

REASONS FOR GRANTING THE WRIT

A Writ of Certiorari should issue so that this Court can decide the important First Amendment issue of whether the plaintiff should have the burden in a libel or slander case to prove the falsity of the statements in question. In addition, a Writ of Certiorari should issue so that this Court can determine whether an appellate court must make an independent review of the record in defamation cases involving private plaintiffs and non-media defendants where the jury has awarded punitive damages. An independent review of the record, if conducted in this case, would have shown that there was no evidence of actual malice so as to overcome any qualified privilege or to allow the imposition of punitive damages. Finally, a Writ of Certiorari should be issued so that this Court can decide whether a finding of actual malice may be based upon ill will, coupled with other evidence which is insufficient alone to support a malice finding.

1. *Gertz v. Robert Welch, Inc.* Requires A Plaintiff to Prove Fault.

This Court has not yet decided whether the burden of proof is on the plaintiff to prove falsity. A review of defamation cases since *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) reveals a wide spectrum of conflicting approaches to the burden of proof question and sharply conflicting decisions. This Court has clearly recognized the importance of this First Amendment question by granting a petition for writ of certiorari in the case of *Wilson v. Scripps-Howard Broadcasting Co.*, 642 F.2d 371 (6th Cir.), *cert. granted*, 454 U.S. 962, *cert. dismissed pursuant to Rule 53*, 454 U.S. 1130 (1981). This Court was deprived of the opportunity to decide this issue in that case, however, when the petition for writ of certiorari was dismissed. This case presents another opportunity for consideration of this important issue which has divided courts across the country.

State and federal courts have considered this issue and reached different conclusions based upon different rationales. Many courts have ruled that *Gertz v. Robert Welch, Inc., supra,* implicitly requires that the burden of proof be on the plaintiff to prove falsity and other courts have placed the burden on the plaintiff without relying specifically on *Gertz*. On the other hand, some courts have ruled that the burden remains on the defendant reasoning that *Gertz* does not apply to cases involving non-media defendants. Still other courts have ruled that, even though *Gertz* does or may apply to a particular case, the fault requirement of *Gertz* does not require a plaintiff to prove falsity. This case, which involves a private plaintiff and a non-media defendant presents this important issue clearly and gives this Court a perfect opportunity to resolve this question fully.

Most of the courts considering the burden of proof issue have rested their decisions, at least in part, upon this Court's decision in *Gertz*. In *Gertz*, this Court held that in cases involving private individuals, the Constitution does not require a plaintiff to prove actual malice to recover, but the plaintiff must make some showing of fault. 418 U.S. at 347. *Gertz* also held that neither presumed damages nor punitive damages may be recovered where there is no showing of knowledge of falsity or reckless disregard for the truth. *Id.* at 349.

However, courts have disagreed as to whether the requirements of *Gertz* apply to cases involving publications by a non-media defendant. This Court now has before it a Vermont case dealing with this issue, *Greenmoss, Inc. v. Dun & Bradstreet, Inc.*, 143 Vt. 66, 461 A.2d 414, *cert. granted*, ____U.S.____, 104 S.Ct. 389 (1983). Most courts dealing with whether the burden is now on the plaintiff to prove falsity have focused on whether the fault requirement of *Gertz* changes the common law presumption of falsity which placed the burden on the defendant to prove truth.

2. The Lower Courts Have Reached Conflicting Results As To The Burden of Proof

Many courts have disagreed on this burden of proof issue as is most clearly shown through a comparison of the results reached by the Sixth Circuit in *Wilson v. Scripps-Howard Broadcasting Co., supra*, and by the Pennsylvania Supreme Court in another case where it reached an opposite result.

In *Wilson v. Scripps-Howard Broadcasting Co., supra*, the Sixth Circuit held that under *Gertz*, the First Amendment requires that the burden of proof be on a private

plaintiff to prove falsity. Although recognizing that at common law, a defamatory statement was presumed false, the court held that the burden has now been changed to require a plaintiff to prove falsity. The court's rationale was that placing the burden on the defendant to prove truth would allow liability to be impermissibly imposed without fault in certain situations. The court stated that under the common law:

> When the jury is uncertain on the issue of truth or falsity of the statement, as it may have been in the present case, it must find in favor of the plaintiff. A presumption of falsity thus permits liability without fault in the close case, in the case of which the jury is uncertain. *See County Court of Ulster County v. Allen,* 442 U.S. 140, 99 S.Ct. 2213, 2224-30, 60 L.Ed.2d 777 (1979), a criminal presumption case discussing the significant effect that burden shifting presumptions may have on the outcome of a close case and requiring a close causal connection between the proved fact and the presumed fact. In libel and slander cases generally, there is no particular causal connection between the proved fact (the making of a derogatory statement) and the presumed fact (the falsity of the statement). There is no particular reason to presume falsity.

Id. at 375-6. The Sixth Circuit therefore held that the burden of proof, as a matter of federal constitutional law, is on the plaintiff to prove falsity. Other cases stating that the burden of proof is on the plaintiff to prove falsity include *Gomes v. Fried,* 136 Cal.App.3d 924, 186 Cal. Rptr. 605 (1982); *Goodrich v. Waterbury Republican-American, Inc.,* 188 Conn. 107, 448 A.2d 1317 (1982); *Applestein v. Knight Newspapers, Inc.,* 337 So.2d 1005 (Fla.Dist.Ct.App. 1976); *Pierce v. Pacific & Southern Co.,* 166 Ga.App. 113, 303 S.E.2d 316 (1983); *Beamer v. Nishiki,* 670 P.2d 1264 (Hawaii

1983); *Sivulich v. Howard Publications, Inc.*, 126 Ill. App.3d 129, 466 N.E.2d 1218 (1984); *McCall v. Courier-Journal and Louisville Times Co.*, 623 S.W.2d 882 (Ky. 1981), *cert. denied*, 456 U.S. 975 (1982); *Jacron Sales Co., Inc. v. Sindorf*, 276 Md. 580, 350 A.2d 688 (1976); *Rinaldi v. Holt, Rinehart & Winston, Inc.*, 42 N.Y.2d 369, 397 N.Y.S.2d 943, 366 N.E.2d 1299, *cert. denied*, 434 U.S. 968 (1977); *Nevada Independent Broadcasting Corp. v. Allen*, 664 P.2d 337 (Nev. 1983); *A.H. Belo Corp. v. Rayzor*, 644 S.W.2d 71 (Tex.App.—Ft. Worth 1982, writ ref'd n.r.e.); *Betancourt v. Whittle*, 659 S.W.2d 895 (Tex.App.—San Antonio 1983, no writ).

Besides the decision in this case, a number of courts have held that *Gertz* does not require the plaintiff to prove falsity. In this case, the court of appeals held that the *Gertz* fault requirement does not imply that the plaintiff must prove falsity and that the Constitution's requirements are met by proof of fault. This line of reasoning was used by the Pennsylvania Supreme Court in *Hepps v. Philadelphia Newspapers, Inc.*, ____Pa.____, 485 A.2d 374 (1984), where the court considered this issue in greater depth than the court in this case. It held that under *Gertz* the burden of proof is not on the plaintiff to prove falsity and that falsity may be presumed with truth as a defense. In so ruling, the court first considered *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) and concluded that it does not require a plaintiff to prove falsity. The Pennsylvania court stated:

> The *New York Times* decision did not expressly state that the constitutional protection required the shifting of the burden of proving falsity to the plaintiff in establishing a prima facie case. Nor did the

> reasoning of that decision necessarily implicitly compel such a result. . . . . In *New York Times,* the Court had no occasion to consider the question of who should bear the burden of proving falsity when it is in fact in issue in the litigation.

In rejecting the idea that *Gertz* compels a conclusion that the plaintiff prove falsity, the Pennsylvania court explained:

> The core of the reasoning of both the trial court and instant appellees is that the *Gertz* prohibition against strict liability necessarily requires that the plaintiff must have the burden of proving the falsity of the matter. This proposition does not logically flow, nor is it consistent with the concern sought to be addressed by the *Gertz* rule. The concept of fault as developed in the *Gertz* decision is not synonymous with the burden of proof of truth or falsity.

The court rejected the argument that to prove fault the plaintiff must prove falsity and stated that negligence can be shown not only by proving falsity but also by showing the manner in which the material was gathered, regardless of its truth or falsity.

Other courts which have ruled that the burden remains on the defendant to prove truth are *Elliott v. Roach,* 409 N.E.2d 661 (Ind.Ct.App. 1980); *Trahan v. Ritterman,* 368 So.2d 181 (La.Ct.App. 1979); *Rogozinski v. Airstream by Angell,* 152 N.J.Super. 133, 377 A.2d 807 (Law Div. 1977), *modified on other grounds,* 164 N.J.Super. 334, 397 A.2d 465 (App.Div. 1979) (per curiam); *Adams v State Farm Mutual Automobile Insurance Co.,* 283 Or. 45, 581 P.2d 507 (1978); *Memphis Publishing Co. v. Nichols,* 569 S.W.2d 412 (Tenn. 1978).

In both *Adams v. State Farm Mutual Automobile Insurance Co., supra,* and *Trahan v. Ritterman, supra,* the courts held that *Gertz* does not apply to cases involving non-media defendants. In *Rogozinski v. Airstream by Angell, supra,* the court assumed that *Gertz* did apply to non-media defendants but concluded that it nonetheless remains possible to presume that a defamatory statement is false and that the burden of proof is on the defendant to prove truth. In *Elliott v. Roach, supra,* and *Memphis Publishing Co. v. Nichols, supra,* the courts stated that the defendant bears the burden of proof on the issue of truth without discussing *Gertz* or any of the preceding decisions of this Court involving libel and slander. Elsewhere in both opinions, however, the courts did discuss *Gertz* in connection with other issues.

It can thus be seen that appellate courts have used varying rationales for holding that the burden is still on the defendant to prove truth. Likewise, courts holding that the burden is on the plaintiff to prove falsity have used differing rationales.

Many cases have cited *Gertz* in holding that the burden of proof is on the plaintiff. For instance, in *Jacron Sales Co. v. Sindorf, supra,* the Maryland court was one of the first to explicitly hold that the requirements of *Gertz* apply to non-media defendants. In so holding, the court noted that truth is no longer an affirmative defense and that the burden of proof is on the plaintiff to prove falsity "since, under this standard, he is already required to establish negligence with respect to such falsity." Therefore, it is apparent that in *Jacron,* the court reasoned that proof of fault requires proof of falsity. Other cases have merely stated that the plaintiff must prove falsity and cited *Gertz* with little or no discussion. *Applestein*

v. Knight Newspapers, Inc., supra; Sivulich v. Howard Publications, Inc., supra; McCall v. Courier-Journal and Louisville Times Co., supra; Betancourt v. Whittle, supra. Still other courts have apparently assumed that to prove malice the plaintiff must prove falsity. *Pierce v. Pacific & Southern Co., supra; Rinaldi v. Holt Rinehart & Winston, Inc., supra.*

Other courts, without relying specifically on *Gertz*, have stated that the burden is on the plaintiff to prove truth as a result of *New York Times* or its progeny. *Gomes v. Fried, supra; Goodrich v. Waterbury Republican-American, Inc., supra; Nevada Independent Broadcasting Corp. v. Allen, supra; A.H. Belo Corp. v. Rayzor, supra.* It is apparent, therefore, that the courts which have considered this issue have differed not only in result but also in the rationales they have applied in deciding whether the burden should be on the plaintiff to prove falsity.

3. The Burden of Proof Should Be On The Plaintiff To Prove Falsity

Courts which have held that the burden of proof remains on the defendant to prove truth have generally used one of two rationales. Some courts, such as the court in this case and the *Hepps* court in Pennsylvania, have held that *Gertz* does not require proof of falsity even if the *Gertz* protections are applicable to a particular case. These cases hold that if fault (whether negligence or malice or another standard) is established, there is no constitutional requirement to impose the additional burden of proving falsity. These courts seem to assume that if fault can be shown, then the statement is obviously false and there is no need to have the plaintiff prove falsity.

This analysis, however, is not presuasive. First, until the defamatory statement in question is proved to be false, the issue of fault should never be reached. Second, to hold that proof of malice or negligence is sufficient without proof of falsity is to hold that a finding of fault can take the place of proof of falsity. This holding equates fault with falsity, even though these concepts are different. Truth or falsity is an objective matter. Negligence or malice, on the other hand, necessarily are based on the defendant's subjective attitude toward the statements made. If a finding of malice, for instance, were equated with proof of falsity, then such a finding would make it unnecessary to submit truth as a defense. As a matter of law and logic, however, a true statement could not be made with actual malice.

A true statement is protected by the First Amendment. This is recognized in *Time, Inc. v. Firestone,* 424 U.S. 448, 458 (1976), where it is stated:

> Because a demonstration that an article is true would seem to preclude finding the publisher at fault, see Cox Broadcasting Co., 420 U.S. at 498-500, 95 S.Ct. at 1047, (Powell, J. concurring), we have examined the predicates for petitioner's contention.

Regardless of whether *Gertz* requires a plaintiff to prove falsity, other decisions of this Court have questioned requiring a defendant to prove truth. In *New York Times Co. v. Sullivan, supra,* this Court recognized that placing the burden of proof of truth on the defendant may inadequately protect First Amendment rights and deter speech. This Court stated:

> Allowance of the defense of truth, with the burden of proving it on the defendant, does not mean that only

> false speech will be deterred. Even courts accepting this defense as an adequate safeguard have recognized the difficulties of adducing legal proofs that the alleged libel was true in all its factual particulars.

376 U.S. at 279. In *Herbert v. Lando*, 441 U.S. 153 (1979), this Court noted that the cases from *New York Times* to *Gertz* have changed the law of defamation from a time when truth and privilege were defenses. 441 U.S. at 175. This Court stated:

> The plaintiff's burden is now considerably expanded. *In every or almost every case*, the plaintiff must focus on the editorial process *in proving false publication* attended by some degree of culpability on the part of the publisher.

Id. at 176. (Emphasis added). It is apparent from those decisions that this Court has implicitly recognized that truthful statements may not be the subject of an action for libel or slander. To allow statements to be presumed false, with the defendant having to prove truth, could potentially result in a defendant being found liable for a truthful statement. Such a result is not permissible under the First Amendment.

Courts which have rejected the burden of proof argument based only upon *Gertz* have, to a certain extent, missed the point. Even if *Gertz* does not itself require a plaintiff to prove falsity, *New York Times* and its progeny compel the conclusion that the plaintiff must prove falsity. For that reason, the cases holding that the plaintiff need not prove falsity because *Gertz* does not apply to cases involving non-media defendants are unpersuasive. The holding in this case does not turn upon whether non-media defendants are afforded the Gertz protections.

Certainly, Hall has insisted throughout the pendency of this action that the *Gertz* protections do apply to non-media defendants. Nevertheless, even if this Court decides that the *Gertz* protections do not apply, the First Amendment requires that a plaintiff prove falsity.

4. First Amendment Considerations Require An Independent Review Of The Record In All Cases Where Punitive Damages Have Been Awarded

In *New York Times Co. v. Sullivan, supra,* this Court held that in appropriate cases an independent examination of the whole record was required "so as to assure ourselves that the judgment does not constitute a forbidden intrusion on the field of free expression." 376 U.S. at 285. This was recently reaffirmed in *Bose Corp. v. Consumers Union of United States, Inc.*, ____U.S.____, 104 S.Ct. 1949 (1984), where this Court stated:

> For the rule of independant review assigns to judges a constitutional responsibility that cannot be delegated to the trier of fact, whether the fact finding function be performed in the particular case by a jury or by a trial judge.

104 S.Ct. at 1959. Traditionally, an independent review of the record has been conducted in libel or slander cases involving public figures or public officials in which actual malice must be shown for the plaintiff to recover. It seems clear, however, that this requirement of independent review should apply to *any* case where First Amendment considerations are involved and there is a danger of intrusion upon protected expression. In *Bose,* this Court commented upon libelous speech as being merely one of

several categories of unprotected speech. This Court went on to state:

> In each of these areas, the limits of the unprotected category, as well as the unprotected character of particular communications, have been determined by the judicial evaluation of special facts that have been deemed to have constitutional significance. In such cases, the Court has regularly conducted an independent review of the record both to be sure that the speech in question actually falls within the unprotected category and to confine the perimeters of any unprotected category within acceptably narrow limits in an effort to ensure that protected expression will not be inhibited.

Therefore, the concept of independent review is not limited to cases in which proof of actual malice is a prerequisite for recovery. Logically, it must extend to any libel or slander case in which First Amendment considerations come into play. Most importantly, independent review is appropriate in cases (such as this one) where punitive damages have been awarded upon a finding of actual malice. In this case, the jury found that each of the statements in question was made with actual malice. All but one of these findings were upheld by the appellate court, which did not conduct an independent review of the entire record.

The jury awarded $1,300,000 in punitive damages. Clearly, the awarding of such a large amount of punitive damages can have a chilling effect on speech and involves First Amendment considerations. In addition, the finding of malice was necessary to overcome the qualified privilege which Hall asserted applied to many of the statements in question. *Dun and Bradstreet v. O'Neil,* 456

S.W.2d 896 (Tex. 1970). While this Court has not addressed the issue of whether an independant review must be conducted in this type of situation, it clearly follows from *New York Times* and *Bose* that the First Amendment requires such a review.

5. Courts Have Differed on Whether Ill Will Evidence is Probative on The Issue of Malice

In holding that there was evidence of actual malice, the court of appeals relied greatly on alleged proof of the ill will of Hall's employees. Hall, of course, contends that if an independent review of all of the evidence (rather than only evidence in support of the judgment) been made, the court would have concluded that there was no evidence of ill will. But, even if there was evidence of ill will, the court erred in holding that ill will, coupled with other evidence, is sufficient to allow a finding of malice.

The decisions of this Court have made it clear that ill will alone is never sufficient to establish *New York Times* malice. *Old Dominion Branch No. 496, National Association of Letter Carriers, AFL-CIO v. Austin,* 418 U.S. 264 (1974); *Greenbelt Cooperative Publishing Association, Inc. v. Bresler,* 398 U.S 6 (1970); *Beckley Newspapers Corp. v. Hanks,* 389 U.S. 81, 82 (1967); *Rosenblatt v. Baer,* 383 U.S. 75, 84 (1966); *Garrison v. State of Louisiana,* 379 U.S. 64, 78 (1964). *New York Times* malice cannot be found even if based upon a combination of falsehood and general hostility. *Greenbelt Cooperative Publishing Association, Inc. v. Bresler, supra* at 10-11. This Court has clearly stated that "ill will toward the plaintiff, or bad motives, are not elements of the *New York Times* standard." *Old Dominion Branch No. 496, National Association of Letter Carriers, AFL-*

CIO v. Austin, supra at 281, *quoting Rosebloom v. Metromedia, Inc.*, 403 U.S. 29 (1971) (Opinion of Brennen, J).

If ill will is not an element of actual malice, then logically a finding of actual malice cannot be based upon ill will even when coupled with other evidence which would be insufficient by itself to establish actual malice. It has been held that bias, ill will and hatred are irrelevant and should not be looked to on the issue of malice. *Fogus v. Capital Cities Media,* 111 Ill.App.3d 1060, 444 N.E.2d 1100 (1982); *Burke v. Diener,* 97 N.J. 465, 479 A.2d 393 (1984). In *Rose v. Koch,* 278 Minn. 235, 154 N.W.2d 409 (1967), the court held it was error to instruct the jury that it could consider evidence of ill will on the issue of malice.

Despite the statements of this Court concerning ill will and malice, lower courts have been confused as to whether ill will is probative on the issue of actual malice. Some other courts, including the court below have held that while ill will alone does not establish actual malice, it can constitute probative evidence of malice. For instance, in *Indianapolis Newspapers, Inc. v. Fields,* 254 Ind. 219, 259 N.E.2d 651, *cert. denied,* 400 U.S. 930 (1970), the court held that evidence of ill will is relevant and admissible on the issue of fault. Likewise, in *Moore v. Bailey,* 628 S.W.2d 431 (Tenn.Ct.App. 1981), ill will evidence was held to be competent, relevant and material on the issue of actual malice. The court in *Reader's Digest Association, Inc. v. Superior Court (Synanon Church),* 208 Cal. Rptr. 137, 690 P.2d 610 (1984) (In Bank) held that anger and hostility toward the plaintiff may indicate that a defendant had serious doubts as to the truth of his statements.

It is apparent that there is a split of authority as to whether ill will evidence is probative on the issue of actual malice. This Court should resolve this conflict by granting a Writ of Certiorari and holding that ill will evidence is irrelevant and may not be coupled with other evidence to establish malice.

6. An Independent Review Of The Record Would Have Shown That There Was No Malice As To The Statements In Question

Had the appellate court conducted an independent review of the record, it would have been apparent that there was no evidence to support the malice findings of the jury. An analysis of the court's opinion shows that the court of appeals upheld the malice findings without making an independent review of the record and relied on an improper standard in finding evidence of malice. The appellate court combined several factors, each legally and constitutionally insufficient to provide proof of actual malice, and stated that together they proved malice. One factor was the alleged ill will of Hall's employees. Another factor was motive, which other lower courts have held does not constitute proof of malice. *Fink v. Combined Comunications Corp.*, 679 P.2d 1108 (Colo. Ct.App. 1984); *Burke v. Diener*, 190 N.J.Super. 382, 463 A.2d 963 (App.Div. 1983), *reversed on other grounds*, 97 N.J. 465, 479 A.2d 393 (1984); *Williams v. Trust Co. of Georgia*, 140 Ga.App. 49, 230 S.E.2d 45, 51 (1976).

A third factor relied on by the court of appeals was the jury's disbelief of the testimony of Hall's employees. Disbelief of testimony is not proof of the contrary in the absence of affirmative evidence, as this Court recognized in *Bose*, stating:

> When the testimony of a witness is not believed, the trier of fact may simply disregard it. Normally discredited testimony is not considered a sufficient basis for drawing a contrary conclusion. . . . [The witness] had made a mistake and when confronted with it he refused to admit it and steadfastly attempted to maintain that no mistake had been made—that the inaccurate was accurate. That attempt failed, but the fact that he made the attempt does not establish that he realized the inaccuracy at the time of publication.

104 S.Ct. at 1066.

Nowhere, however, did the appellate court focus on Hall's employees' attitude toward the truth and falsity of their statements. The court focused solely on the evidence which the court believed would uphold the judgment. Of course, even without a review of the evidence, it is apparent that the court applied an incorrect standard in holding that there was evidence of malice. A review of all of the evidence, though, would have shown that there was no real evidence of ill will on the part of the employees. It should be noted the court did not even discuss the one statement of Hilley's upon which the court found that there was evidence of malice. Clearly, there was no review made of the evidence as to the malice of those statements. Each of the elements relied upon by the court of appeals in this case—ill will, motive, disbelief of testimony by the jury—are insufficient individually or in combination to support a finding of malice. An independent review of all of the evidence would have shown that the evidence was insufficient to establish either actual malice or ill will on the part of Hall's employees.

CONCLUSION

The decision of the Fourteenth Supreme Judicial District Court of Appeals of the State of Texas in this case conflicts with the decisions of this Court and raises issues which are in serious conflict among the lower courts of this nation concerning several First Amendment issues. Hall respectfully submits that a Writ of Certiorari should issue so that this Court can reverse the holdings of the Court of Appeals.

Respectfully submitted,

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By: _____

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CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that three true and correct copies of the foregoing Petition for a Writ of Certiorari to the Fourteenth Supreme Judicial District Court of Appe of the State of Texas has been served on all part required to be served by serving opposing counsel, Mr. Stephen Susman, 2400 Allied Bank Plaza, Houston, Texas 77002, by certified mail, postage pre-paid, return receipt requested, by depositing the documents served in a United States post office or mailbox, with first-class postage pre-paid addressed to counsel of record at his address in accordance with Rule 28.3, on the 17th day of April, 1985.

IRVING C. STERN

APPENDIX A

FRANK B. HALL & CO., INC., et al,
Appellant,

v.

Larry W. BUCK,
Appellee.

No. C14-82-234CV.

Court of Appeals of Texas,
Houston (14th Dist.).

July 26, 1984.

Before JUNELL, MURPHY and SEARS, JJ.

OPINION

JUNELL, Justice.

Larry W. Buck (Buck or appellee) sued his former employer, Frank B. Hall & Co. (Hall or appellant) for damages for defamation of character, misrepresentation, and breach of contract. By unanimous verdict, a jury found damages for breach of contract, defamation of character and exemplary damages. The court entered judgment for appellee for $1,905,000.00 in damages, plus interest, attorney's fees and costs of court. For the reasons set forth below, we affirm.

Appellee, salesman in the insurance business, was approached in the spring of 1976 by a representative of Hall with a prospective job offer. Appellee was then an executive vice-president of the insurance firm

of Alexander & Alexander, and in the previous year he generated approximately $550,000.00 in commissions for the firm. He was the top producer in Alexander's Houston office and was ranked nationally among the top five salesmen for Alexander. After several meetings, Buck accepted Hall's offer of employment and began working for Hall on June 1, 1976. Hall agreed to pay Buck an annual salary of $80,000.00 plus additional compensation equal to seven and one-half percent of net retained commissions for each year to a maximum commission of $600,000.00, plus fringe benefits. The agreement was to be for a three year period. Several Alexander employees followed Buck to Hall's office. During the next several months Buck generated substantial commission income for Hall and succeeded in bringing several major accounts to the firm.

In October, 1976, Mendel Kaliff, then president of Frank B. Hall & Co. of Texas, held a meeting with Buck and Lester Eckert, Hall's office manager and a former Alexander employee. Kaliff informed Buck his salary was being reduced to $65,000.00 and that Hall was eliminating Buck's incentive and profit sharing benefits. Kaliff told Buck these measures were being taken because of Buck's failure to produce sufficient income for Hall. However, Kaliff added that if Buck could generate $400,000.00 net commission income by June 1, 1977, his salary and benefits would be reinstated retroactively.

On March 31, 1977, at another impromptu meeting, Kaliff and Eckert abruptly fired Buck and instructed him not to return to Hall's offices. Buck sought employment with several other insurance firms, but his efforts were fruitless. Distraught at having lost his job and being unable to find suitable employment in the insurance business,

Buck hired an investigator, Lloyd Barber, in an attempt to discover Hall's true reasons for firing him. This suit is based upon statements made by Hall employees to Lloyd Barber and to Charles Burton, a prospective employer, and upon a note written by Virginia Hilley, a Hall employee. Appellant brings eighty points of error, which will be grouped in thirteen categories.

In points one through thirteen, appellant challenges the legal and factual sufficiency of the evidence to support the jury's findings that the statements to Barber were published. Hall urges the statements were invited as a matter of law.

Lloyd Barber contacted Mendel Kaliff, Lester Eckert and Virginia Hilley and told them that he was an investigator, Buck was being considered for a position of trust and responsibility, and Barber was seeking information about Buck's employment with Frank B. Hall & Co. Barber testified that he had interviewed Kaliff, Eckert and Hilley on separate occasions in September and October of 1977, and had tape recorded the conversations. Appellee introduced into evidence Barber's properly authenticated investigative reports, which were based on these taped interviews. The report shows Kaliff remarked several times that Buck was untrustworthy, and not always entirely truthful; he said Buck was disruptive, paranoid, hostile and was guilty of padding his expense account. Kaliff said he had locked Buck out of his office and had not trusted him to return. He charged that Buck had promised things he could not deliver.

Eckert told Barber that Buck was horrible in a business sense, irrational, ruthless, and disliked by office personnel. He described Buck as a "classical sociopath," who would

verbally abuse and embarass Hall employees. Eckert said Buck had stolen files and records from Alexander & Alexander. He called Buck "a zero," "a Jekyll and Hyde person" who was "lacking in compucture [sic] or scruples."

Virginia Hilley told Barber that Buck could have been charged with theft for materials he brought with him to Hall from Alexander & Alexander.

Any act wherein the dafamatory matter is intentionally or negligently communicated to a third person is a publication. In the case of slander, the act is usually the speaking of the words. RESTATEMENT (SECOND) OF TORTS § 577 comment a (1977). There is ample support in the record to show that these individuals intentionally communicated disparaging remarks to a third person. The jury was instructed that "Publication means to communicate defamatory words to some third person in such a way that he understands the words to be defamatory. A statement is not published if it was authorized, invited or procured by Buck and if Buck knew in advance the contents of the invited communication." In response to special issues, the jury found that the slanderous statements were made and published to Barber.

Hall argues that Buck could and should have expected Hall's employees to give their opinion of Buck when requested to do so.

Hall is correct, in stating that a plaintiff may not recover for a publication to which he has consented, or which he was authorized, procured or invited, *Lyle v. Waddle,* 144 Tex. 90, 188 S.W.2d 770 (1945); and it may be true that Buck could assume that Hall's employees would give their opinion when asked to do so. However, there is nothing in the record to indicate that Buck knew

Hall's employees would *defame* him when Barber made the inquiries. The accusations made by Kaliff, Eckert and Hilley were not mere expressions of opinion but were false and derogatory statements of fact. There is sufficient evidence that Buck had no knowledge of what Kaliff, Eckert and Hilley would say to Barber. Buck testified that he was fired abruptly and unexpectedly on March 31, 1977. Buck had generated $308,000.00 in commissions for Hall at the time of his termination on March 31; he testified he easily could have reached or exceeded his goal of $400,000.00 had he been allowed to work until June 1. Buck testified that Kaliff's reason for firing him was untenable, "He said that I was being fired because I had not fulfilled my commitment and I had not written a sufficient amount of business to justify keeping me on. It was economically unsound for them to do so." Barber stated that he was hired for the specific purpose of ascertaining the reasons for Buck's termination, and that he was not aware of any lawsuits when he spoke to Kaliff, Eckert and Hilley. The evidence is sufficient to support the jury's finding that the statements were not invited, and the jury was entitled to believe that appellee did not know why Hall had fired him and did not set up the Barber interviews to create a cause of action for defamation.

Hall also argues that the evidence shows conclusively that Barber was acting as Buck's agent and that he tricked the Hall employees into making derogatory remarks.

A defamer cannot escape liability by showing that, although he desired to defame the plaintiff, he did not desire to defame him to the person to whom he in fact intentionally published the defamatory communication.

The publication is complete although the publisher is mistaken as to the identity of the person to whom the publication is made. RESTATEMENT (SECOND) OF TORTS § 577 comment 1 (1977). Likewise, communication to an agent of the person defamed is a publication, unless the communication is invited by the person defamed or his agent. RESTATEMENT § 577 comment e. We have already determined that the evidence is sufficient to show that Buck did not know what Kaliff, Eckert or Hilley would say and that he did not procure the defamatory statements to create a lawsuit. Thus, the fact that Barber may have been acting at Buck's request is not fatal to Buck's cause of action. There is absolutely no proof that Barber induced Kaliff, Eckert or Hilley to make any of the defamatory comments. Points of error one through thirteen are overruled.

Hall's points of error fourteen through twenty-five focus on statements made by Lester Eckert to Charles Burton, then president of another large insurance brokerage firm, Carroon & Black. Burton testified that Buck contacted him in the summer of 1977 to discuss employment possibilities with Carroon & Black. When asked why he was no longer with Frank B. Hall & Co., Buck told Burton that he "really [didn't] know." Because he was seriously interested in hiring Buck, Burton telephoned Eckert to find out the circumstances surrounding Buck's termination. Eckert told Burton, "Larry didn't reach his production goals." Burton, who was very familiar with Buck's exceptional record as a good producer in the insurance business, was surprised at Eckert's response. When pressed for more information, Eckert declined to comment, stating, "I can't go into it." Burton then asked if Eckert would rehire Buck, to which Eckert answered, "No."

Hall urges the evidence is legally and factually insufficient to prove the statements were made and published, that the statements were invited as a matter of law, and that there is no evidence to support the jury's finding that the statement was calculated to convey that Buck was terminated for serious misconduct. The record before us belies these contentions.

Burton testified that Eckert made the statements and that *because of* Eckert's comments, he was not willing to extend an offer of employment to Buck. He stated, "When I talked to Mr. Eckert at Frank B. Hall agency, he led me to believe that there was something that he was unable to discuss with me" and "[t]here was something that he was unwilling to tell me about that I had to know."

Hall argues that Eckert did not remember ever talking to Burton; the words are susceptible to a non-defamatory interpretation; and Burton later testified he inferred nothing negative about Buck from Eckert's statements. Thus, Hall contends, there is no evidence or insufficient evidence that Burton attached any defamatory significance to Eckert's statements. We find the evidence sufficient to show that Burton reasonably understood them in a defamatory sense.

When an ambiguity exists, a fact issue is presented. The court, by submission of proper fact issues, should let the jury render its verdict on whether the statements were fairly susceptible to the construction placed thereon by the plaintiff. *Easley v. Express Publishing Co.*, 299 S.W.2d 782, 784 (Tex.Civ.App.—San Antonio 1957, writ ref'd n.r.e.). Here, the jury found (1) Eckert made a statement calculated to convey that Buck had been

terminated because of serious misconduct; (2) the statement was slanderous or libelous; (3) the statement was made with malice; (4) the statement was published; and (5) damage directly resulted from the statement. The jury also found the statements were not substantially true. The jury thus determined that these statements, which were capable of a defamatory meaning, were understood as such by Burton. The jury is the exclusive judge of the credibility of witnesses and the weight to be given their testimony. In resolving contradictions and conflicts, they may choose to believe all or part or none of the testimony of any one witness in arriving at the finding it concluded was the most reasonable under the evidence. *United States Fire Insurance Co. v. Biggs,* 614 S.W.2d 496 (Tex.Civ. App.—Amarillo 1981, no writ). The jury was instructed that statements were not published if Buck authorized, invited or procured them and if he knew in advance the contents of the invited communications. Therefore, in responding affirmatively to the special issues on publication, the jury necessarily found that Eckert's statements were calculated to imply and did in fact imply that Buck had been terminated because of serious misconduct and that these statements were not invited. The jury could reasonably have believed that Buck did not know why he was fired and did not know in advance that Eckert would make defamatory remarks to Burton. The findings are supported by the evidence and are not against the great weight and preponderance of the evidence. Points of error fourteen through twenty-five are overruled.

Points of error twenty-six through twenty-nine concern the legal and factual sufficiency of the evidence to support the jury's findings in answer to Special Issue No. 7 that the defamatory statements were made with malice. The

communications in question were (1) statements made by Eckert to Lloyd Barber, Charles Burton and two Hall employees, Peter Barbara and Warren Johnson; (2) Kaliff's remarks to Lloyd Barber; (3) Hilley's comments to Lloyd Barber; and (4) a note written by Hilley and attached to a box of files in Hall's offices.

Warren Johnson, who was then employed by another firm, testified that Eckert contacted him in the fall of 1977. Eckert said he had terminated an employee named Larry Buck, whom Eckert referred to as a "crook." Eckert *then* asked Johnson to ascertain whether Buck in fact had a criminal record.

Peter Barbara, a former vice-president at Hall, testified that Eckert had called Buck a "crook." Barbara said that while they were on a business trip, Eckert made the derogatory comments to him, referring to Buck as dishonest.

In August, 1980, Leone Talbot, administrative manager at Frank B. Hall & Co., found a box of files lying in a corner at Hall's Houston office. Attached was a note reading: "Files brought by Larry Buck to Frank B. Hall & Co. when he joined the firm 6/76—They have been retained in case there is a need for them as evidence in a lawsuit pending. V. Hilley". The box contained information from Alexander & Alexander; the insinuation was that Buck had "stolen" this property from his previous employer. The other statements in question were those by Kaliff, Eckert and Hilley to Lloyd Barber, they have been outlined above.

The jury instructed that a statement is made with malice if it was made with knowledge that it was false, or with reckless disregard of whether it was false or not.

This was the definition of malice required by the United States Supreme Court in *New York Times Co. v. Sullivan,* 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964). The jury found that all of the above statements were published, were defamatory and were made with malice.

Although there may be question as to whether the submission of the *New York Times* definition of malice is proper in a case involving a private plaintiff and a non-media defendant, neither party has complained that a different standard should have applied. We therefore confine our examination to whether the record supports the jury's findings that the statements were made with knowledge of their falsity or with reckless regard of the truth of the statements.

In *El Paso Times, Inc. v. Trexler,* 447 S.W.2d 403 (Tex. 1969), the Texas Supreme Court addressed the issue of malice.[1] There, the court declared the following definition of malice incorrect: "done with a desire or intent to injure a person through a deliberate falsehood or with actual knowledge of its probable falsity." In reversing the court of civil appeals, the supreme court found no evidence that would have supported a finding of malice under the *correct (New York Times)* standard. The only evidence relied upon in *Trexler* to show actual malice was the failure of a newspaper employee to make an investigation about the truth or falsity of a "letter to the editor." *Id.* at 406. There was no evidence of ill will or animosity. Citing the First Amendment, the court held that failure to investigate or negligence in failing

1. Although *Trexler* involved a public figure versus a media defendant, the case is instructive because the court applied the *New York Times* standard and examined the evidence to support a finding of malice under that definition.

to act as a reasonably prudent person is insufficient to uphold a finding of malice under the *New York Times* standard. *Id.* at 406. However, we find that in the case before us, there is evidence which supports the jury's findings of malice.

Malice has been equated with "a want of good faith." *British Overseas Airways Corp. v. Tours and Travel of Houston, Inc.*, 568 S.W.2d 888 (Tex.Civ.App.—Houston [1st Dist.] 1978, writ ref'd n.r.e.). While evidence of ill will alone is not enough to establish malice, proof that the defendant entertained ill will toward the plaintiff is probative evidence that the defendant published the information either knowing of its falsity or with reckless disregard for its truth or falsity. *See Stearns v. McManis,* 543 S.W.2d 659 (Tex.Civ.App.—Houston [1st Dist.] 1976, writ dism'd). Thus, when coupled with other evidence, proof of ill will may furnish a sufficient basis for a jury's finding of malice.

Here there was evidence that the relationship between Eckert and Buck was strained at best. Buck testified that Eckert was angered when Buck would not testify as Eckert wished in Alexander & Alexander's lawsuit against Eckert for breach of the non-competition agreement Eckert had signed while employed by Alexander & Alexander. The men had disagreements over the management of Hall's Houston office. Eckert testified that his relationship with Buck deteriorated instantly when Eckert became office manager at Hall. Eckert said he was constantly irritated by Buck's expense account reports; he was critical of Buck for berating members of Hall's office staff. Eckert expressed disapproval of Buck's "office politicking" and described the office relationship as a "constant hassle" and a "day-in-and-day-out battle."

Eckert complained of having to "meet all of [Buck's] little whims." There was evidence that Eckert drew an annual salary of $39,000.00, with no profit sharing or commission benefits, while Buck, Eckert's subordinate, had a salary of $80,000.00 plus a sizeable commission incentive, profit sharing and expense benefits.

Kaliff testified he ran a character reference check on Buck prior to offering him a job at Hall, and it revealed nothing derogatory about Buck's character or reputation. Kaliff also admitted that Buck's reputation and character were good at the time of trial. When asked at trial about the accusations of "office politicking," Kaliff admitted that the information he had received about Buck was secondhand, from Eckert. Kaliff told Lloyd Barber, "all my information (concerning Buck) is secondhand. . . ."

Hilley admitted that she did not in fact know who brought the box of files to Frank B. Hall & Co., or when they arrived. She said that she merely found the box in Buck's office after his termination and wrote the note hereinabove attributed to her and attached it to the box of files.

Buck had brought several major accounts to Frank B. Hall & Co., and had generated about $308,000.00 in commission income to Hall. After Buck was fired, Buck's accounts were assigned "almost immediately" to other Hall agents. All of Buck's clients were contacted at once in an effort to retain Buck's accounts. There is evidence that Hall saved approximately $75,000.00 in commission and salary to Buck by firing him early.

Hall argues there is no evidence that Kaliff, Eckert or Hilley knew any of their statements were false or that

they doubted the truth of their statements; additionally, Hall urges Eckert testified he never said anything about Buck that he believed to be untrue.

We recognize that *New York Times* may require proof of the subjective state of mind of the publisher. *See St. Amant v. Thompson,* 390 U.S. 727, 732, 88 S.Ct. 1323, 1326, 20 L.Ed.2d 262 (1968). However, this does not mean that a plaintiff must secure an admission from the defendant that he published the statement knowing of its falsity or with serious doubt as to its truth. The issue is most easily proved by circumstantial evidence. *Gulf Construction Co. v. Mott,* 442 S.W.2d 778 (Tex.Civ. App.—Houston [14th Dist.] 1969, no writ). There must be sufficient evidence *to permit the conclusion* that the defendant in fact entertained serious doubts as to the truth of his publication. *St. Amant,* 390 U.S. at 731, 88 S.Ct. at 1325. (emphasis added).

Here the jury was warranted in finding that all of the statements except the note written by Hilley and attached to the box of files were made with malice. Buck impeached the testimony of Kaliff and Eckert several times before the jury; Eckert's reputation for truth and veracity was in question. Thus, the jury was entitled to disbelieve the profession of good faith. The jury was entitled to believe that Eckert harbored animosity toward Buck, that Kaliff attacked Buck's character with serious doubts as to the truth of his accusations, that Hilley entertained serious doubts as to the truth of her assertions and that Hall had self-serving motives for Buck's early termination.

We hold that there is no evidence to support the jury finding in answer to Special Issue No. 7(7)(d) to the

effect Virginia Hilley acted with malice in writing the note she attached to the box of files she found in Buck's office after his termination. However, we have held the evidence sufficient to support all of the findings of malice, and the absence of any evidence to support the answer to Special Issue No. 7(7)(d) does not require a reversal of the judgment. Points of error twenty-six through twenty-nine are overruled.

In points of error thirty through thirty-two appellant contends the evidence is legally and factually insufficient to support the award of exemplary damages. It is well-settled that exemplary damages may be allowed in a defamation case where the defamed party establishes the existence of a wilful or wanton act sufficient to support a finding of malice. *British Overseas Airways Corp.*, 568 S.W.2d at 894. The evidence was sufficient to support a finding of actual malice; and in response to the exemplary damage issue, the jury found that Hall had acted with "ill will, bad intent, malice or gross disregard to the rights of Buck." Points of error thirty through thirty-two are overruled.

Under points of error thirty-three through thirty-six Hall argues that the statements to Barber and Burton were qualifiedly privileged as a matter of law and that the trial court erred in refusing to submit a special issue asking whether the statements to Barber and Burton were qualifiedly privileged.

Even if the statements in question were indeed qualifiedly privileged, the jury's findings of malice abrogated any such privilege. *Houston v. Grocers Supply Co.*, 625 S.W.2d 798 (Tex.App.—Houston [14th Dist.] 1981, no writ). Those findings are supported by the evidence;

thus, the issue of qualified privilege is irrelevant. Points of error thirty-three through thirty-six are overruled.

In points of error thirty-seven through forty Hall urges that Hilley's note was absolutely or conditionally privileged and thus cannot serve as a basis for liability.

Communications made in the course of a judicial proceeding will not serve as the basis of a civil action for libel or slander, regardless of the negligence or malice with which they are made. *James v. Brown,* 637 S.W.2d 914 (Tex. 1982). This privilege has traditionally applied only to in-court proceedings: statements made by the judge, jurors, counsel, parties or witnesses in open court, or in pre-trial hearings, depositions, affidavits, pleadings or other papers in the case. *Id.* at 916-917. The supreme court in *James* expanded this privilege and applied the protection of absolute privilege to out-of-court statements. In connection with ongoing guardianship proceedings, the court found the reports of two doctors, addressed to the judge and to a party's attorney, to be absolutely privileged. The supreme court's opinion is based upon RESTATEMENT (SECOND) OF TORTS § 558, which provides an absolute privilege to a witness who publishes defamatory statements in communications preliminary to a proposed judicial proceeding or as a part of a judicial proceeding in which he is testifying, if it has some relation to the proceeding. The privilege is meant *to protect the witness while testifying* or *while in private with an attorney* about matters involved in *litigation.*

Appellant cites *James* as authority for its position that Hilley's note, as a communication made by a witness during a judicial proceeding, is absolutely privileged. We cannot agree that the note in the instant case is on equal

footing with the communications involved in *James*. Hilley's note was not addressed or directed to the attention of any particular person involved in the litigation. It was not made as a basis for statements to be used in court, or in contemplation of her testimony in court or an assertion in an affidavit, deposition, pleading or other matter before the court. It was not intended as a confidential communication to an attorney. To adopt Hall's position would be to hold that once a judicial proceeding is initiated, any person who may be called as a witness may make gratuitous defamatory statements to any person about the plaintiff and be shielded by the defense of absolute privilege. Since absolute privilege completely forecloses a remedy in a civil action, the defense of absolute privilege has traditionally been very limited. *Parker v. Holbrook,* 647 S.W.2d 692 (Tex.App.—Houston [1st Dist.] 1982, writ ref'd n.r.e.). The absolute privilege of *James* does not apply to the facts at hand.

Hall's alternative argument is that the note carried a qualified privilege. We do not agree. A qualified privilege comprehends communications made in good faith on subject matter in which the author has an interest or with reference to which he has a duty to perform to another person having a corresponding interest or duty. *Houston v. Grocers Supply Co., Id.* at 800. Here the note was not directed to the attention of anyone; the privilege does not apply. Moreover, the jury's finding that the statement was made with malice destroyed any qualified privilege which may have existed. Points of error thirty-seven through forty are overruled.

In points of error forty-one and forty-two Hall contends the trial court erred in refusing to submit special issues placing the burden of proof on Buck that each of the

allegedly libelous or slanderous statements was false. The trial court had placed the burden of proof on Hall under Special Issue 7(c). For reasons set forth below we hold the trial court did not err in refusing Hall's requested special issues.

For many years the courts of Texas have held in libel and slander actions that truth of the defamatory statements is an affirmative defense, and the burden of proving truth by a preponderance of the evidence is on the defendant. *Norris v. White,* 154 S.W.2d 319 (Tex.Civ. App.—San Antonio 1941, writ ref'd w.o.m.); *Ledgerwood v. Elliott,* 51 S.W. 872 (Tex.Civ.App. 1899, no writ); *Clark v. Bohms,* 37 S.W. 347 (Tex.Civ.App. 1896, no writ); *Coles v. Thompson,* 27 S.W. 46 (Tex. Civ.App. 1894, no writ). This rule is in accord not only with the common law but also with the express enactment of the Texas legislature. TEX. REV. CIV. STAT. ANN. art. 5431 (Vernon 1958).

Both expressly and implicitly Texas courts have consistently recognized that truth is a defensive matter. *Cranfill v. Hayden,* 97 Tex. 544, 80 S.W. 609, 614-16 (1904); *Parker v. Holbrook,* 647 S.W.2d 692 (Tex.App. —Houston [1st Dist.] 1982, writ ref'd n.r.e.); *Shihab v. Express-News Corp.,* 604 S.W.2d 204 (Tex.Civ.App. —San Antonio 1980, writ ref'd n.r.e.); *Downer v. Amalgamated MeatCutters and Butcher Workmen of North America,* 550 S.W.2d 744, 747 (Tex.Civ.App.—Dallas 1977, writ ref'd n.r.e.); *Rehkopf v. Texarkana Newspapers, Inc.,* 460 S.W.2d 939, 942 (Tex.Civ.App.— Texarkana 1970, writ ref'd n.r.e.); *Templeton v. Rogers,* 450 S.W.2d 900, 902 (Tex.Civ.App.—Beaumont 1970, writ dism'd); *Gulf Construction Company v. Mott,* 442 S.W.2d 778, 784 (Tex.Civ.App.—Houston [14th Dist.]

1969, no writ); *Express Publishing Co. v. Gonzalez,* 350 S.W.2d 589, 592 (Tex.Civ.App.—Eastland 1961, writ ref'd n.r.e.); *Lovejoy v. Mutual Broadcasting System,* 220 S.W.2d 308, 312 (Tex.Civ.App.—El Paso 1948, no writ); *Caller Times Pub. Co. v. Chandler,* 122 S.W.2d 249, 252 (Tex.Civ.App.—San Antonio 1938), *aff'd,* 130 S.W.2d 853 (Tex. 1939); *General Motors Acceptance Corporation v. Howard,* 474 S.W.2d 929 (Tex. Civ.App.—Beaumont 1971), *aff'd,* 487 S.W.2d 708 (Tex. 1972).

Apparently not denying that Texas law had been settled for many years to the effect stated above, appellant argues that because of recent United States Supreme Court decisions the burden is now on the plaintiff to prove falsity of defamatory statements. In support of its argument appellant relies on three recent cases: *Borden, Inc. v. Wallace,* 570 S.W.2d 445 (Tex.Civ.App.—El Paso 1978, writ dism'd); *Roegelein Provision Co. v. Mayen,* 566 S.W.2d 1 (Tex.Civ.App.—San Antonio 1978, writ ref'd n.r.e.); and *A.H. Belo Corp. v. Rayzor,* 644 S.W. 2d 71 (Tex.Civ.App.—Fort Worth 1982, writ ref'd n.r.e.).

In *Borden v. Wallace* the trial court, apparently without objection, submitted a special issue inquiring whether the alleged defamatory statements were true, thus placing the burden of proof on the defendant. The jury answered "No," and thereby failed to find from a preponderance of the evidence that the statements were true. On appeal the El Paso Court of Civil Appeals stated that the issue should have placed the burden on the plaintiff to prove that the statement was false. However, immediately after making that statement, the court further stated: "But the semantics of the issue become unimportant, for we

conclude that as a matter of law the facts inquired about in Special Issue No. 6 were true." Contrary to appellant's contention, the court did not cite any authority for its statement that the issues should have placed the burden of proof on the plaintiff, and the court's opinion contains no analysis or statement of the reasons why the plaintiff should have the burden of proving falsity.

In *Roegelein Provision Company v. Mayen,* an appeal from a judgment awarding damages for libel, Roegelein contended there was no finding that the defamatory statements were false and, therefore, the judgment should be reversed. The San Antonio Court of Civil Appeals did not decide the question as to where the burden of proof should be placed on the issue of the truth or falsity of the defamatory statements. That court stated clearly the following:

> For the purpose of this discussion we assume that, as the result of a series of decisions by the Supreme Court of the United States, beginning with *New York Times Co. v. Sullivan,* 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964), a person who seeks recovery for defamation has the burden of proving that the defamatory statement is false. The Mayens do not contend otherwise.

The court then pointed out that the jury had found malice on the part of Roegelein and that malice was one finding necessary to the recovery for libel. The court held that because Roegelein had neither requested submission of, nor objected to the court's failure to submit the omitted issue concerning falsity, the court would presume that the omitted issues were found in such manner as would support the judgment in favor of Mayens if the evidence supported such finding. This is definitely not a holding

by the San Antonio Court of Civil Appeals that the plaintiff in a libel or slander case has the burden of proving that the defamatory statements are false. In *A.H. Belo Corp. v. Rayzor* the *Dallas Morning News* wrote several articles about a scandal involving officials at North Texas State University. The paper quoted Rayzor as having called the vice-president of North Texas State and saying "I'm going to get your ass. The worm has turned and I'm going to hire somebody to get you." The article in the paper referred to Rayzor's statements as "an alleged threat." Rayzor sued claiming the newspaper libeled him by reporting that he had "threatened" the vice-president of the University.

The Fort Worth Court of Appeals reversed the judgment in favor of Rayzor, holding that he failed to prove that the newspaper article contained any "false, defamatory fact about Rayzor," and that the use of the term "alleged threat" was at most an opinion about the statement Rayzor made and could not support the jury's findings that the newspaper article made false and libelous implications about Rayzor.

It is true that in *Rayzor,* the court of appeals stated that the burden of proving falsity was on Rayzor, but such statement was not necessary to the court's decision. There the trial court did in fact submit the issue with the burden of proof on Rayzor and the jury answered "We do not." The effect of the answer is that Rayzor failed to carry his burden of proving that the defamatory statement was false. It does not constitute a jury finding that the statement was true. There is no indication in the opinion of the court of appeals that Rayzor complained of having to carry the burden of proving falsity. Furthermore, the court of appeals held as a matter of law

that all of the statements in the articles were either factually true or constituted fair and privileged comment on the general situation existing at North Texas State University and the phone calls from Rayzor to Carter and Miller.

In our opinion the cases relied on by appellant do not support appellant's contention that Texas law has changed so as to now place on a private defamation plaintiff the burden of proving falsity of the defamatory statements in order to recover damages for libel and slander.

Furthermore, the decisions of the United States Supreme Court in the mid 1970's do not compel the change in Texas law argued by appellant Hall. In *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974) the Supreme Court specifically held that the First Amendment to the Constitution does not permit the imposition of liability without fault on a publisher or broadcaster of defamatory falsehoods injurious to a private individual. Aside from this restriction, the court said the states may define for themselves the appropriate standard of liability. 418 U.S. at 346-47, 94 S.Ct. at 3010. The *Gertz* court had refused to apply to a private defamation plaintiff the strict standard of *New York Times Co. v. Sullivan, supra,* which had held that a media defendant could not be held liable to a public figure for defamation damages unless the plaintiff proved actual malice. There has been no decision by the United States Supreme Court holding that in order to prove "fault" of the defendant, the plaintiff must prove falsity of the defamatory statement. In fact the year after *Gertz* was decided the United States Supreme Court in *Cox Broadcasting Corp. v. Cohn,* 420 U.S. 469, 95 S.Ct. 1029, 43 L.Ed.2d 328 (1975) declined even to state whether the Constitution required

that truth be recognized as a defense in defamation action brought by a private person. The court stated:

> It is true that in defamation actions, where the protected interest is personal reputation, the prevailing view is that truth is a defense; . . . .
>
> The Court has nevertheless carefully left open the question whether the First and Fourteenth Amendments require that truth be recognized as a defense in a defamation action brought by a private person as distinguished from a public official or public figure.

420 U.S. 489-90, 95 S.Ct. 1043-44. In our opinion *Gertz* does not imply that the Constitution places on private defamation plaintiffs the burden of proving falsity. We believe that another decision by the United States Supreme Court in *Time, Inc. v. Firestone,* 424 U.S. 448, 96 S.Ct. 958, 47 L.Ed.2d 154 (1976) supports our conclusion in this regard. In *Firestone,* a Florida state trial court had placed the burden on the defendant to prove that a newspaper report about a non-public plaintiff was true. Under Florida law the only findings required for determination of liability for defamation were (1) whether the article was defamatory, (2) whether it was true, and (3) whether the defamation caused the plaintiff harm. The Supreme Court held that with respect to liability for defamation of a private individual, these three findings would have been sufficient to impose liability if there had been some finding of fault on the part of the defendant. The Supreme Court vacated and remanded the case, not because the burden of proving truth had been placed on the defendant, but because there had been no finding of fault on the part of the defendant within the meaning of *Gertz.*

Under the decisions of the Supreme Court in *Gertz*, *Cox Broadcasting* and *Firestone* a private defamation plaintiff satisfies the Constitution by proving fault. In this case Buck, the appellee, has satisfied the Constitution's requirements by proving malice as defined in *New York Times v. Sullivan*. Malice under this *New York Times* test and as defined in the court's charge to the jury in the instant case is proved if the defamatory statement is made with knowledge that it is false or reckless disregard of whether it was false or not. In the instant case the jury findings that the statements were made with reckless disregard of whether or not they were false is sufficient proof of fault as required under *Gertz*.

Points of error forty-one and forty-two are overruled.

By points of error forty-three and forty-four Hall maintains Hilley's written note stating that a box full of files to which the note was attached were files Buck had taken with him to Hall was substantially true as a matter of law and the jury's finding to the contrary is against the great weight and preponderance of the evidence. The jury answered "No" to Special Issue No. 7(7)(C) inquiring whether it found from a preponderance of the evidence that the written note was substantially true. This answer was a failure to find the note true, not a finding that it was not true.

Hilley admitted that she did not know who had brought the box of files to Hall or when it had arrived. Another Hall employee testified she saw Hilley's note and understood it to be uncomplimentary to Buck. The evidence is clear that many files in the box were Hill files. Although the box contained some Alexander & Alexander materials, there was no direct proof that Buck brought to Hall any of the materials contained in the box. A

number of other Hall employees had come from Alexander & Alexander and could have brought such material. The jury's failure to find that the note was substantially true is not against the great weight and preponderance of the evidence. Points forty-three and forty-four are overruled.

Hall next complains in points forty-five through fifty-one there is no evidence to support the jury's finding that damage directly resulted from the statements in question and no evidence to support the jury's findings as to the amount of damage suffered by appellee as a result of the defamatory statements.

The jury responded affirmatively to a list-type issue inquiring whether damage directly resulted from each of the statements. The following damage issues were submitted:

SPECIAL ISSUE NO. 12

What sum of money, if paid now in cash, do you find would fairy and reasonably compensate Buck for his damages, if any, that you find directly result ed from slanderous or libelous statements, if any, made by Hall? Consider the following elements of damages, if any, and none other:

A. Lost earnings caused by his inability to obtain employment similar to that at Alexander & Alexander following termination from Hall on March 31, 1977;

B. Mental anguish, humiliation and embarrassment; and

C. Damage to reputation and character.

Answer in dollars and cents.

Answer: 605,000.00

At the point the jury finds Buck's earnings in his consulting work would have first equaled or exceeded the sum he would have earned by employment similar to that at Alexander & Alexander, no further offsets should be made.

Damages need not be absolute and certain, but may not be purely speculative.

SPECIAL ISSUE NO. 13

What portion of Buck's lost earnings caused by slanderous or libelous statements, if any, made by Hall do you find occurred during the time period March 31, 1977, through May 31, 1979?

Answer in dollars and cents.

Answer: 414,000.00

Hall urges that the so-called "constitutional privilege" delineated in *Gertz* should apply in this case. The *Gertz* privilege provides that between a private plaintiff and a publisher or broadcaster of defamatory statements, the defamer, in the absence of actual malice, is liable only for "actual injury." Hall contends that the *Gertz* privilege precludes the application of presumed damages, and it was thus incumbent upon plaintiff to show "actual injury" more than mere worry, anxiety, vexation or anger. Hall urges that Buck's testimony of depression, loss of weight, difficulty in sleeping, and problems with his wife and family were insufficient. He argues that Buck needed to prove "intense pain of body or mind, or a high degree of suffering." *Ryder Truck Rentals, Inc. v. Latham,* 593 S.W.2d 334, 339 (Tex.Civ.App.—El Paso 1979, writ ref'd n.r.e.). Buck counters that the *Gertz* privilege should not apply to Hall and that the damage award should not hinge upon proof of actual injury.

We need not address the issue, however, because here the jury found the statements were made with actual malice, and those findings are supported by the evidence; the *Gertz* privilege applies only in the absence of actual malice. Thus, it was not necessary for Buck to prove "actual injury." *See Gertz*, 418 U.S. at 349, 94 S.Ct. at 3011.

Furthermore, Buck testified that he suffered depression, self-doubt, and weight loss as a result of the episode in question. He also had difficulty sleeping and suffered distress in his marital and family relationships because of the attacks on his integrity. Burton's testimony clearly shows that Eckert's statements had the direct effect of deterring Burton from dealing with Buck. As a result, Burton did not extend Buck an offer of employment. Joseph Chernow, a certified public accountant, made a projection of Buck's potential earnings had he secured a job comparable to his position at Alexander & Alexander. Basing his calculations upon what Buck would have earned if he had not left Alexander & Alexander, or, if after his termination he was able to get a job similar to the one at Alexander & Alexander, Chernow testified that Buck suffered a pecuniary loss of over $686,000.00. The jury's finding of $605,000.00 in damages was in line with the evidence. Points forty-five through fifty-one are overruled.

By points fifty-two and fifty-three, Hall urges the court erred in refusing to submit special issues inquiring whether Eckert's statements were referable to his employment duties.

An action is sustainable against a corporation for defamation by its agent, if such defamation is referable to the duty owing by the agent to the corporation and was

made while in the discharge of that duty. Neither express authorization nor subsequent ratification is necessary to establish liability. *Texam Oil Corp. v. Poynor,* 436 S.W. 2d 129 (Tex. 1968).

Lester Eckert was executive vice president and head of Hall's Houston office. There is no dispute that Eckert was in fact the manager in charge of Hall's Houston office. Eckert took an active role in contract negotiations between Hall and Buck and served as a go-between for Hall's corporate attorneys with respect to Buck's employment contract. He took responsibility for working out some details of Buck's employment, including Buck's pension and life insurance benefits. He was familiar with the producers' salaries and commissions and was responsible for reviewing employees' production statistics and expense account reports. There was evidence that Eckert played an active role in making employment decisions and he was a member of Hall's executive committee.

There is no evidence in the record which suggests that Eckert's statements were made outside the scope of his employment. Hall points to the testimony of Thomas O'Brien, vice-president and general counsel of Hall, wherein O'Brien admitted on cross-examination that Hall did not have a general practice of calling former employees "crooks." We are not persuaded. The record contains no evidence which shows any limitation on Eckert's broad duties as vice-president and office manager.

Peter Barbara testified that Eckert made the defamatory statements on a business trip during a conversation about Barbara's employment contract. Eckert made the remarks in response to Barbara's request for a contract similar to Buck's. Although Eckert did not recall making the remarks under these circumstances, Eckert admitted

having conversations with Barbara and calling Buck a "crook." When asked about the circumstances of the conversations Eckert answered, "Peter Barbar was part of our Executive Committee and he knew very well what was going on, and he knew about files that were stolen that we discovered in the office."

Eckert denied making any statements to Warren Johnson. However, Johnson testified that Eckert contacted him in the fall of 1977, while Eckert was Hall's executive vice-president. Eckert related that Larry Buck had been a Hall employee whom Eckert had terminated. After making the defamatory remarks, Eckert requested Johnson to determine whether in fact Buck had a criminal record.

The statements to Barber were made in response to Barber's inquiries concerning Buck's employment with Hall.

Hall points to no evidence which shows that Eckert made the statements while he was not acting on Hall's behalf, or in his capacity as Hall's representative. There is no evidence which indicates that Eckert was not authorized to furnish information pertaining to a former employee, or that Eckert's authority as manager was limited with respect to personnel decisions and activities. The evidence is uncontradicted that Eckert was furthering Hall's business when he uttered the slanderous words: There being no evidence to raise a fact issue as to Eckert's course and scope of employment, the court did not err in refusing to submit the tendered issue. See *Wagner v. Caprock Beef Packers Co.*, 540 S.W.2d 303 (Tex. 1976). Points of error fifty-two and fifty-three are overruled.

Hall's points of error fifty-four through sixty-six concern the impeachment of its principal witness, Mendel Kaliff.

Kaliff owned and operated his own insurance business until 1975 when Kaliff sold out to Hall and joined Hall's organization. During trial, appellant impeached Kaliff with evidence that (1) prior to the Hall buy-out, Kaliff had engaged in improper billing practices; (2) Kaliff had been involved in "insider trading" as prohibited by the Securities and Exchange Act of 1934; (3) Kaliff had resigned as an officer and director in October 1978, but had been retained by Hall as a "senior consultant;" (4) Kaliff had surrendered all of his insurance licenses to the Texas State Board of Insurance; (5) Hall and Kaliff had paid about $3,000,000.00 restitution; (Kaliff himself had paid slightly more than half of this amount, and Hall had paid the remainder; Kaliff then indemnified Hall); and (6) Hall had loaned Kaliff $151,000.00, interest-free.

Hall first argues that the doctrine of *res inter alios acta* precluded the admission of this evidence. We disagree. The rule provides that prior acts or transactions by one of the parties are not admissible *to prove that similar acts have reoccurred;* the prior acts are thus incompetent evidence when offered for this purpose. *See Texas Farm Bureau Mutual Insurance Co. v. Baker,* 596 S.W.2d 639 (Tex. Civ. App.—Tyler 1980, writ ref'd n.r.e.). Here, unlike the cases cited by Hall, the evidence was not offered as evidence that the party had engaged in the same pattern of conduct, e.g., that Kaliff again had engaged in questionable insurance practices, but rather that Kaliff was beholden to Hall.

Hall also argues that the evidence amounted to an improper attack on Kaliff's character with evidence of specific acts of misconduct. This position is likewise inapposite, because the evidence was admissible to impeach Kaliff's

credibility rather than his *character*. A party has a right to show interest, bias, or prejudice which may affect a witness' credibility. *City of Longview v. Boucher*, 523 S.W.2d 274 (Tex. Civ. App.—Tyler 1975, writ ref'd n.r.e.). In this respect, the jury is entitled to know any fact which would tend to influence the testimony given by a witness. The jury should be given the opportunity to judge for themselves the witness's credibility in light of the relationship between the parties, the witness's motive for testifying, or any matter which would tend to influence the testimony given by a witness. *Steve v. State*, 614 S.W.2d 137 (Tex.Crim.App. 1981); *City of Longview*, 523 S.W.2d at 279.

Here the testimony showed Kaliff's relationship with Hall; it was proper to allow the jury to make its own determination of whether Kaliff was grateful to Hall in light of factors which may have tended to color his testimony; (1) Hall's retaining Kaliff with substantial compensation despite Kaliff's questionable conduct; (2) Hall's payment of over a million dollars in restitution on Kaliff's behalf; and (3) Hall's $151,000.00 no-interest loan to Kaliff.

The trial court has considerable discretion in permitting cross-examination of a witness to show bias or prejudice; the motives which operate on the mind of a witness are not immaterial or irrelevant. *Steve*, 614 S.W.2d at 140. Facts which tended to show Kaliff's relationship with Hall and his motive for testifying were proper impeachment evidence; the court did not abuse its discretion in admitting it before the jury. Moreover, we remain unconvinced that the admission of the impeachment evidence probably caused the rendition of an improper verdict. The error, if any is harmless. TEX.R.CIV.P.

434. Points of error fifty-four through sixty-six are overruled.

We next consider Hall's points of error sixty-seven through seventy-five. All of these points deal with Hall's contention that the letter agreement of April 30, 1976 was not a contract. Following some preliminary negotiations, Mendel Kaliff on April 30, 1976, wrote appellee the following letter, which reads in pertinent part:

> This letter will serve as an informal memorandum concerning our present agreement with regard to your compensation should you become associated with Frank B. Hall & Co.
>
> We would reimburse you for all usual and necessary travel and entertainment expenses. You would have an annual salary of $80,000 plus an additional compensation amounting to 7½% of net retained commission income for each employment year, up to a maximum of $600,000 of commissions in any year. Also, we will have a division of "profits" that we would enjoy on your production according to the following formula.
>
> Frank B. Hall would deduct the first 50% of net retained commissions, also deduct your salary and supplemental commission (the 7½%), also deduct your actual travel and entertainment as well as your actual fringe benefit cost, and any balance would be shared equally between you and Frank B. Hall. The attachment is designed to illustrate this formula.
>
> We would execute a three-year employment agreement which would also contain a three-year covenant not to compete, and these agreements, of course, would need to be acceptable to you and to Frank B. Hall & Co.
>
> This letter is intended to be a summary of the agreement that we have at this time.

Hall's position is that the letter expressly provided for a later agreement and does not contain many essential terms of the agreement; thus, the letter is not an enforceable contract. Specifically, Hall points to the fact that Buck refused to sign three drafts of the parties' formal agreement and that there was an ongoing debate about Buck's compensation formula and the terms of a covenant not to compete.

Two persons may fully agree upon the terms of a contract, knowing that there are other matters on which they have not agreed and on which they expect further negotiation. Such an expectation does not prevent the agreement already made from being an enforceable contract. This may be true even though they expressly provide in their agreement that the new matters, when agreed upon, shall be incorporated along with the contract already made. *Scott v. Ingle Bros. Pacific, Inc.*, 489 S.W. 2d 554 (Tex. 1972) citing 1 CORBIN ON CONTRACTS (1963).

Here, the fact that Kaliff and Buck may have contemplated a more formal contract which was never executed may be *evidence* that the letter was not meant to embody their agreement; likewise, the unsettled negotiations on the covenant not to compete may be indicative that the letter was only a tentative draft or proposal of an agreement. However, we view neither of these factors as conclusive; the jury was entitled to resolve the question of the intention of the parties. The letter was not unenforceable as a matter of law.

At trial, Kaliff admitted several times that the letter contained the essential terms of the agreement that he and Buck had reached. When asked why he wrote the letter Kaliff responded, "[B]ecause Larry Buck wanted

the compensation formula spelled out in detail, and I did, also, because it was important to both of us to make sure that we had a clear understanding of what that was going to be . . . and I didn't want any misunderstanding to come up in the future, and also . . . I wanted it clearly understood as did Larry that the no-compete [sic] would be part of the contract. These were the items—the essential items that the lawyer would have to prepare in the contract." Kaliff testified that he intended for the letter to be an "informal memo . . . setting forth what [they had] agreed to." Buck testified that the letter contained the essential terms of the agreement reached with Kaliff. The jury found that the parties intended the letter to be an agreement; that finding is supported by the evidence. Points sixty-seven through seventy-five are overruled.

Lastly, in points of error seventy-six through eighty Hall complains of the jury's findings on the damage issues. Considering the elements of lost earnings, mental anguish, humiliation, embarrassment and damage to reputation and character, the jury found actual damages resulting from the defamation to be $605,000.00; $414,000.00 of that amount was attributed to lost wages. The jury found exemplary damages of $1,300,000.00.

The damages resulting from libel or slander are purely personal and cannot be measured by any fixed standard or rule. The amount to be awarded rests largely in the discretion of the jury, and the appellate court will not disturb the verdict unless it appears from the record to be excessive or the result of passion, prejudice, or other improper influence. *Winkel v. Hankins,* 585 S.W.2d 889 (Tex. Civ. App.—Eastland 1979, writ dism'd).

The record reflects that Buck had been in the insurance business since 1957. He was an established producer who,

shortly before his departure from Alexander & Alexander, had an annual salary of $80,000.00 plus lucrative benefits; he was Alexander & Alexander's top producer in Houston. After his termination from Hall in March, 1977, he unsuccessfully sought employment with numerous insurance firms until the time of trial. He discovered that Hall's employees were making derogatory statements about him, reflecting on his integrity and his ability to produce business. Buck related the devastating effect the episode had on his emotional well-being and his personal relationships. There was evidence that at least one employment opportunity did not materialize because of the defamatory statements. There is ample evidence of Buck's pecuniary loss as well as evidence that an insurance producer's reputation is a most valued asset. The jury found the statements were made with actual malice, and those findings are supported by the evidence.

We hold that the evidence supports the award of actual damages and the amount awarded is not manifestly unjust. Furthermore, in responding to the issue on exemplary damages, the jury was instructed that exemplary damages must be based on a finding that Hall "acted with ill will, bad intent, malice or gross disregard to the rights of Buck." Although there is no fixed ratio between exemplary and actual damages, exemplary damages must be reasonably apportioned to the actual damages sustained. *Alamo National Bank v. Kraus,* 616 S.W.2d 908 (Tex. 1981). Because of the actual damages and the abundant evidence of malice, we hold that the award of punitive damages was not unreasonable. Points seventy-six through eighty are overruled.

The judgment of the trial court is affirmed.

APPENDIX B

SUPREME COURT OF TEXAS
P. O. Box 12248
Supreme Court Building
Austin, Texas 78711
Garson R. Jackson, Clerk

December 12, 1984

Mr. Irving C. Stern
Irving C. Stern and Associates
1980 Post Oak Blvd., Suite 1600
Houston TX 77056

Mr. Stephen D. Susman
Ms. Evelyn Jo Wilson
2400 Allied Bank Plaza
Houston, TX 77002

RE: Case No. C-3536

STYLE: FRANK B. HALL & CO., INC. ET AL
v. LARRY W. BUCK

Dear Counsel:

Today, the Supreme Court of Texas refused the above referenced application for writ of error with the notation, No Reversible Error.

Respectfully yours,

Garson R. Jackson, Clerk

By: Signature illegible
Deputy

APPENDIX C

SUPREME COURT OF TEXAS
P. O. Box 12248
Supreme Court Building
Austin, Texas 78711
Mary M. Wakefield, Clerk pro tempore

January 23, 1985

Mr. Irving C. Stern
Irving C. Stern and Associates
1980 Post Oak Blvd., Suite 1600
Houston TX 77056

Mr. Stephen D. Susman
Ms. Evelyn Jo Wilson
2400 Allied Bank Plaza
Houston, TX 77002

RE: Case No. C-3536

STYLE: FRANK B. HALL & CO., INC. ET AL
v. LARRY W. BUCK

Dear Counsel:

Today, the Supreme Court of Texas overruled petitioner's motion for rehearing of the application for writ of error in the above styled case.

Respectfully yours,

Mary M. Wakefield,
Clerk pro tempore

By: Signature illegible
Deputy

FILED
MAY 21 1985
ALEXANDER L. STEVAS,
CLERK

NO. 84-1639

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

FRANK B. HALL & CO. INC.,
FRANK B. HALL & CO. INC. OF TEXAS
AND FRANK B. HALL & CO.,
Petitioners,

v.

LARRY W. BUCK,
Respondent.

On Petition for a Writ of Certiorari to the Fourteenth Supreme Judicial District Court of Appeals of the State of Texas

RESPONDENT'S BRIEF IN OPPOSITION

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27 pp

QUESTIONS PRESENTED FOR REVIEW

I. In a defamation suit between a private plaintiff and a non-media defendant, where the plaintiff has proved actual malice, does the federal Constitution preclude the State of Texas from applying its common-law rule that truth is a defensive matter?

II. Where a State trial court has awarded punitive damages in a private defamation suit against a non-media defendant, does the federal Constitution require a State appellate court to make an independent review of all evidence relevant to actual malice?

III. Is evidence of ill will relevant to the issue of actual malice?

IV. Does the evidence support the jury's finding of actual malice?

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NO. 84-1639

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

FRANK B. HALL & CO. INC.,
FRANK B. HALL & CO. INC. OF TEXAS
AND FRANK B. HALL & CO.,
Petitioners,

v.

LARRY W. BUCK,
Respondent.

On Petition for a Writ of Certiorari to the Fourteenth Supreme Judicial District Court of Appeals of the State of Texas

RESPONDENT'S BRIEF IN OPPOSITION

OPINION BELOW

The opinion of the Texas court of appeals is reported at 678 S.W.2d 612, and is reprinted in the Appendix to the Petition for Certiorari, at A1-A34. Petitioners' subsequent application to the Supreme Court of Texas for a writ of error was refused without opinion, with the notation "No Reversible Error." (Appendix to Petition for Certiorari, at B1.)

JURISDICTION

Petitioners' writ of error was refused by the Supreme Court of Texas on December 12, 1984. That court overruled Petitioners' motion for rehearing on January 23, 1985, and the petition for certiorari was filed on April 17, 1985. Respondent received the petition on April 22, 1985.

Petitioners are invoking this Court's jurisdiction under 28 U.S.C. § 1257(3).

STATEMENT OF THE CASE

Respondent Larry W. Buck ("Buck") brought this suit against Petitioners Frank B. Hall & Co. Inc., Frank B. Hall & Co. Inc. of Texas and Frank B. Hall & Co. (collectively referred to as "Hall"). Hall is an insurance brokerage firm.

In 1976, Buck was an insurance salesman for Alexander & Alexander, an insurance brokerage firm that competes with Hall. Buck was the top salesman in Alexander & Alexander's Houston office, and was among Alexander & Alexander's top five salesmen nationally.

Hall hired Buck away from Alexander & Alexander. He began work on June 1, 1976 under a three-year employment contract. Several Alexander & Alexander employees followed Buck to Hall's office. During the next several months, Buck generated substantial commission income for Hall and brought several major accounts to the firm.

In March 1977, Buck was abruptly fired by Mendel Kaliff (the president of Hall's Texas operations) and Lester Eckert (a Hall vice-president in charge of its

Houston office manager, and a former Alexander & Alexander employee). Buck's termination had been orchestrated by Kaliff, Eckert and Virginia Hilley (another Hall vice-president and former Alexander & Alexander employee).

Subsequent to Buck's termination from Hall, several defamatory statements were made by Kaliff, Eckert and Hilley. As a result, Buck was unable to procure a similar sales position. His accounts stayed with Hall.

After a five-week trial in Texas state court, the jury returned a verdict for Buck on his claims for breach of contract and defamation. The jury specifically found, *inter alia,* that

- Hall and Buck entered an agreement on April 30, 1976
- Hall did not have good cause to discharge Buck
- Hall uttered seventeen defamatory statements concerning Buck
- Each of the defamatory statments was made with actual malice[1]
- None of the defamatory statements was substantially true
- Hall's defamatory statements damaged Buck in the amount of $605,000, of which $414,000 occurred prior to May 31, 1979
- Hall's breach of contract damaged Buck in the amount of $479,000 through the end of the contract term (May 31, 1979)

---

1. The jury was instructed, "A statement is made with 'malice' if it is made with knowledge that it is false or with reckless disregard of whether it was false or not."

— Hall should pay $1,300,000 in exemplary damages

— The reasonable attorneys' fees for the breach-of-contract claim were $335,000.

The trial court then entered judgment against Hall for $670,000 actual damages,[2] $1,300,000 exemplary damages and $335,000 attorneys' fees.

Hall has raised a plethora of issues in the post-trial proceedings. Among those has been

— (a) the argument that the trial judge erroneously placed upon Hall the burden of proving the substantial truth of its defamatory statements. This issue was raised in the trial court, in Hall's appeal, and in Hall's petition for writ of error to the Supreme Court of Texas.

— (b) the argument that the appellate court should undertake an "independent review" of the evidence concerning actual malice. This issue was raised for the first time in Hall's motion for rehearing in the court of appeals.

— (c) the argument that evidence of ill will is irrelevant to the determination of actual malice. This issue was raised for the first time in Hall's motion for rehearing in the court of appeals.

— (d) the argument that an "independent review" would show that the evidence does not support the jury's finding of actual malice. As

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2. This amount was calculated by adding $479,000 (breach of contract) and $605,000 (defamation)—then subtracting $414,000 for the temporal overlap between the two.

stated above, the notion of "independent review" was raised for the first time in Hall's motion for rehearing in the court of appeals.

SUMMARY OF ARGUMENT

Respondent Buck submits that the writ should be denied:

I. Hall has failed to show that the ruling that truth is a defensive matter raises an issue worthy of review by this Court. Its assertion of a conflict of decisions is belied by a careful review of the cited cases. In any event, the state court's ruling was correct. Moreover, any error would have been harmless, because Buck's proof of actual malice established falsity "as a practical matter."

II. Hall has shown no conflict of decisions as to whether an "independent review" is required in non-media cases. Moreover, Hall did not raise this issue seasonably. Even though the Constitution does not require "independent review," this case has been subjected to intense review.

III. Again, Hall has shown no conflict of decisions as to whether evidence of ill will is relevant to the determination of actual malice. The ill will issue was not raised seasonably in the state courts and has not been preserved for review by this Court. In any event, evidence of ill will is clearly relevant.

IV. Hall's suggestion that an independent review would show the absence of actual malice is simply a restatement of its second issue, which was not raised seasonably. In addition, there is no conflict of decisions on this point. Finally, the record contains ample evidence of malice.

REASONS WHY THE WRIT SHOULD BE DENIED

I. "In a defamation suit between a private plaintiff and a non-media defendant, where the plaintiff has proved actual malice, does the federal Constitution preclude the State of Texas from applying its common-law rule that truth is a defensive matter?"

Hall has asked this Court to review the ruling that Hall had the burden of proving that its defamatory statements were substantially true. According to Hall, the First Amendment required the State of Texas to abandon its common-law rule that defamatory statements are presumptively false, and so truth is a defensive matter.

Buck submits that Supreme Court review of this issue is not warranted.

A. Hall has not shown a conflict of decisions.

As Hall acknowledges, this case "involves a private plaintiff and a non-media defendant." (Petition for Certiorari, at 10.) Plaintiff Buck is not a public figure or a public official, nor is Hall a media defendant. When Hall argues that this issue presents a conflict of decisions, however, it chooses to forget these fundamental differences.

Hall cites eleven decisions supposedly in conflict with the ruling in this case. (*Id.*, at 12-13.) Of those eleven decisions, ten involved media defendants. *Wilson v. Scripps-Howard Broadcasting Co.*, 642 F.2d 371 (6th Cir.), *cert. granted,* 454 U.S. 962, *cert. dismissed pursuant to Rule 53,* 454 U.S. 1130 (1981) (private plaintiff, television defendant); *Gomes v. Fried,* 186 Cal.Rptr. 605, 136 Cal.App.3d 924 (1982) (public plaintiff, news-

paper defendant); *Goodrich v. Waterbury Republican-American, Inc.*, 188 Conn. 107, 448 A.2d 1317 (1982) (public plaintiff, newspaper defendant); *Applestein v. Knight Newspapers, Inc.*, 337 So.2d 1005 (Fla. Dist. Ct.App. 1976) (private plaintiff assumed arguendo, newspaper defendant); *Pierce v. Pacific & Southern Co.*, 166 Ga.App. 113, 303 S.E.2d 316 (1983) (public plaintiff, television defendant); *Beamer v. Nishiki*, 66 Hawaii 572, 670 P.2d 1264 (1983) (public plaintiff, newspaper defendant); *Sivulich v. Howard Publications, Inc.*, 126 Ill. App.3d 129, 466 N.E.2d 1218 (1984) (private plaintiff assumed arguendo, newspaper defendant); *McCall v. Courier-Journal & Louisville Times Co.*, 623 S.W.2d 882 (Ky. 1981), *cert. denied*, 456 U.S. 975 (1982) (private plaintiff, newspaper defendant); *Rinaldi v. Holt, Rinehart & Winston, Inc.*, 42 N.Y.2d 369, 397 N.Y.S.2d 943, 366 N.E.2d 1299, *cert. denied*, 434 U.S. 969 (1977) (public plaintiff, book publisher defendant); *Nevada Independent Broadcasting Corp. v. Allen*, 99 Nev. 404, 664 P.2d 337 (1983) (public plaintiff, television defendant).[3]

The eleventh case, *Jacron Sales Co., Inc. v. Sindorf*, 276 Md. 580, 350 A.2d 688 (1976), is the only one involving a private plaintiff and a non-media defendant. But in that decision, the Maryland Court rested its ruling on *state law* rather than the federal Constitution. *Id.* at 695.

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3. Only four of these cases involved private plaintiffs. Of those four, three involve summary judgment motions—and so the question was whether there were triable disputes of fact, not which party had the burden of resolving those disputes. Applestein v. Knight Newspapers, Inc.; Sivulich v. Howard Publications, Inc.; McCall v. Courier-Journal & Louisville Times Co.

The fourth private-plaintiff case, Wilson v. Scripps-Howard Broadcasting Co., is a questionable decision. *See* 454 U.S. 962 (granting certiorari). In any event, it is inapposite because (a) it involves a media defendant and (b) there was no finding of actual malice.

Hall has not cited *any* holding that—in a defamation suit between a private plaintiff and a non-media defendant —the Constitution requires a State to impose upon the plaintiff the burden of affirmatively proving the falsity of defamatory statements.

B. The burden was properly placed on the defendant.

According to Hall, this Court's recent decisions have jettisoned the common-law rule that "truth is a defense" in private defamation actions. The Texas court of appeals explained why Hall is wrong:

> [T]he decisions of the United States Supreme Court in the mid 1970's do not compel the change in Texas law argued by appellant Hall. In *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), the Supreme Court specifically held that the First Amendment to the Constitution does not permit the imposition of liability without fault on a publisher or broadcaster of defamatory falsehoods injurious to a private individual. Aside from this restriction, the Court said the states may define for themselves the appropriate standard of liability. 418 U.S. at 346-47. . . . In fact the year after *Gertz* was decided the United States Supreme Court in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975) declined even to state whether the Constitution required that truth be recognized as a defense in a defamation action brought by a private person. The Court stated:
>
> > It is true that in defamation actions, where the protected interest is personal reputation, the prevailing view is that truth is a defense; . . .
> >
> > The Court has nevertheless carefully left open the question whether the First and Fourteenth Amendments require that truth be recognized as a de-

> fense in a defamation action brought by a private person as distinguished from a public official or public figure.

420 U.S. 489-90. In our opinion *Gertz* does not imply that the Constitution places on private defamation plaintiffs the burden of proving falsity. We believe that another decision by the United States Supreme Court, in *Time, Inc. v. Firestone*, 424 U.S. 448 (1976), supports our conclusion in this regard. In *Firestone*, a Florida state trial court had placed the burden on the defendant to prove that a newspaper report about a non-public plaintiff was true. Under Florida law the only findings required for determination of liability were (1) whether the article was defamatory, (2) whether it was true, and (3) whether the defamation caused the plaintiff harm. The Supreme Court held that with respect to liability for defamation of a private plaintiff, these three findings would have been sufficient to impose liability if there had been some finding of fault on the part of the defendant. The Supreme Court vacated and remanded the case, not because the burden of proving truth had been placed on the defendant, but because there had been no finding of fault on the part of the defendant within the meaning of *Gertz*.

> Under the decisions of the Supreme Court in *Gertz*, *Cox Broadcasting* and *Firestone* a private defamation plaintiff satisfies the Constitution by proving fault. In this case Buck, the appellee, has satisfied the Constitution's requirements by proving malice as defined *New York Times v. Sullivan* [, 376 U.S. 254 (1964)].

(Petition for Certiorari, at A21-A23.)

Hall was given ample opportunity to prove that its defamatory statements were true. It was thus given its due under Texas common law. This Court's recent decisions are not to the contrary.

C. In this case, any error in allocating the burden of proof would be harmless.

Both as a matter of logic and as a matter of the record evidence in this case, falsity has been established in this case.

In arguing that the logic of *Gertz* impliedly placed the burden of proving falsity upon a defamation plaintiff, Hall referred the Texas courts to Comment j to § 580B of the Restatement (Second) of Torts:

> The burden of proof of showing fault is undoubtedly upon the plaintiff. If the plaintiff has the burden of showing that the defendant was negligent in failing to ascertain the falsity or the defamatory character of the statement or that he acted recklessly or knowingly in this record, there remains little, if any, significance in the common law position that truth of the statement is a defense to be raised by the defendant and on which he has the burden of proof. (See § 581A). As a practical matter, in order to meet the constitutional obligation of showing defendant's fault as to truth or falsity the plaintiff will necessarily find that he must show the falsity of the defamatory communication.

(*Quoted in* Brief for Appellants, at 60; *cited in* Petitioners' Application for Writ of Error, at 67.)[4] In discussing the plaintiff's burden of showing *fault,* the editors thus point out that "as a practical matter," a showing of fault neces-

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4. Hall stresses the (inapposite) decision in Wilson v. Scripps-Howard Broadcasting Co., 642 F.2d 371 (6th Cir. 1981). According to the Sixth Circuit, it removed the burden from a media defendant because "a rule that places the burden of proving truth on the defendant permits the imposition of liability without fault in certain situations." *Id.* at 375. That is, the court was really concerned lest there be liability without *fault.*

sarily encompasses a showing of falsity.[5] Because Buck did establish falsity "as a practical matter" when he established fault, any error as to the burden on the specific issue of truth or falsity would be harmless.[6]

The evidence in this case confirms this logic. On the record, there can be no serious doubt that the defamatory statements were false.

In effect, review by this Court would merely produce an advisory opinion. If the Court is interested in the issue, it should await a case where the issue is more clearly presented and where the issue was essential to the judgment below.

II. "Where a State court has awarded punitive damages in a private defamation suit against a non-media defendant, does the federal Constitution require a State appellate court to make an independent review of all evidence relevant to actual malice?"

The jury found that Hall acted with actual malice. Groping for support from this Court's decision in *Bose Corp. v. Consumers Union of United States, Inc.*, ____ U.S.____, 104 S.Ct. 1949 (1984), Hall now argues that the Texas court of appeals should have extended its "independent review" of the evidence on actual malice.

5. The Restatement actually refuses to state any opinion as to which party has the burden of proof of the issue of truth and falsity. Restatement (Second) of Torts, Caveat to § 613 at 307; *Id.*, Comment b to § 581A at 235-36. The editors do point out, however, "It has been consistently held that truth is an affirmative defense which must be raised by the defendant and on which he has the burden of proof." *Id.*

6. Indeed, Buck proved actual malice, which is the most stringent variant of fault.

For several reasons, this issue is not appropriate for review.

A. There is no conflict of decisions.

In its brief discussion on this point (Petition for Certiorari, 19-21), Hall does not even attempt to show a conflict between this case and others. It cites no decisions from other States or from lower federal courts, and it acknowledges that "this Court has not addressed the issue of whether an independent review must be conducted in this type of situation." (*Id.* at 21.)

B. This issue was not seasonably raised in the state courts.

Hall did not even *ask* the State court of appeals to undertake any constitutionally required "independent review" of this case; instead, it simply pursued the traditional Texas "no evidence" and "insufficient evidence" issues. Only *after* the appellate decision had been rendered—in the motion for rehearing—did Hall first refer to any notion of independent review. Under established principles, that was too late. *See, e.g., Radio Station WOW v. Johnson,* 326 U.S. 120, 128 (1945) ("Questions first presented to the highest State court on a petition for rehearing come too late for consideration here, unless the State court exerted its jurisdiction in such a way that the case could have been brought here had the questions been raised prior to the original disposition.").

C. The Constitution does not require independent review in this case.

In *Bose,* this Court reaffirmed the role of independent review "in proper cases"—i.e., where the "line must be

drawn" between speech unconditionally guaranteed and speech which may be regulated. 104 S.Ct. at 1963-64, quoting *New York Times v. Sullivan,* 376 U.S. at 285.

This is not one of those "proper cases" for independent review. It involves neither a public plaintiff nor a media defendant. Even if it did, its facts do not place it on the cutting edge between protected and unprotected speech, where independent review might be appropriate.

D. This case has been subjected to intense review.

Respondent Buck would emphasize the thorough judicial scrutiny to which the extensive record in this case has actually been subjected.

After a five-week jury trial, the trial court thoughtfully considered several post-trial motions. Hall's motion for new trial, for example, did cause the judge to consider whether the jury's findings were based on sufficient evidence, in light of the entire record. *Burnett v. Motyka,* 610 S.W. 2d 735 (Tex. 1980); *Fisher Construction Co. v. Riggs,* 325 S.W.2d 126 (Tex. 1959). The record was then scrutinized under the same standard by the court of appeals, *id.*, after which the state supreme court denied Hall's writ of error with the notation "no reversible error." The extensive post-trial procedures have taken almost three-and-a-half years.

Hall simply disagrees with the jury's findings, and the acceptance of these findings by three reviewing courts. There is no legitimate basis for doubting the adequacy of appellate review.

III. "Is evidence of ill will relevant to the issue of actual malice?"

Hall asks this Court to hold that "ill will evidence is irrelevant" to the issue of actual malice. (Petition for Certiorari, at 23.)

Like the others raised by Hall, this issue is not appropriate for review by this Court.

A. There is no conflict of decisions.

Hall cites three cases supposedly in conflict with the view that ill will is relevant to the issue of actual malice. *Fogus v. Capital Cities Media, Inc.*, 111 Ill.App.3d 1060, 444 N.E.2d 1100 (1982); *Rose v. Koch*, 278 Minn. 235, 154 N.W.2d 409 (1967); *Burke v. Diener*, 97 N.J. 465, 479 A.2d 393 (1984). (*See* Petition for Certiorari, at 22.) But there is no real conflict.

In *Fogus*, a lower court in Illinois did state broadly that "bias, ill will, or even hatred of a public official is irrelevant." 444 N.E.2d at 1103. But that court was addressing "a mere grudge," and immediately went on to "emphasize that under some facts, the difference between a mere grudge and an effort to act maliciously might involve a subtle nuance in the evidence"; the court then acknowledged that "proving actual subjective malice is a complicated task." *Id.* In any event, the entire passage is dictum, for the court expressly stated that "we need only decide the threshold issue of whether the allegations are sufficient to state a cause of action." *Id.*[7]

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7. Indeed, the court held that it was sufficient to allege that the defendants made statements "in retaliation for certain drug arrests made by the plaintiff." 444 N.E.2d at 1104.

In *Rose*, the Minnesota court rejects, without discussion, an instruction that in an actual malice determination, a jury "could consider evidence of personal ill will, the exaggerated language of the libelous document, the extent of its publication, or *any other factors that the jury might regard as equally relevant.*" 154 N.W.2d at 421 (emphasis added); *id.* at n. 26. At best, it is not clear what portion of the instruction was deemed objectionable. The probable source of the court's concern was the open-ended final clause. The ambiguity of the court's opinion severly undermines Hall's assertion of a true conflict.

In *Burke*, the New Jersey court contrasted actual malice with common-law malice, 479 A.2d at 399, then ruled that actual malice did not exist where the plaintiff's own evidence belied the notion that the defendants entertained serious doubts that their statements were true. *Id.* at 401. Though one sentence states that "the jury is not to look for evidence of spite or ill will to judge the actor's speech," *id.* at 399, that notion is not only overstatement but also dictum.

B. This issue was not seasonably raised in the state courts.

At trial, Hall made no objection to any evidence of ill will. Afterwards, on appeal, Hall took the (uncontroverted) position that evidence of ill will *alone* is not sufficient to establish actual malice. For example, Hall stated to the court of appeals,

> Decisions of the United States Supreme Court have made it clear that ill will alone is *never* sufficient to establish *New York Times* malice. . . .

> While evidence of ill will may be probative on the issue of *New York Times* malice, it can never be dispositive of that issue. . . .

(Reply Brief for Appellants, at 24-25.) The court of appeals accepted this proposition:

> While evidence of ill will alone is not enough to establish malice, proof that the defendant entertained ill will toward the plaintiff is probative evidence that the defendant published the information either knowing of its falsity or with reckless disregard for its truth or falsity. *See Stearns v. McManis*, 543 S.W.2d 649 (Tex. Civ. App.—Houston [1st Dist.] 1976, writ dism'd). Thus, when coupled with other evidence, proof of ill will may furnish a sufficient basis for a jury's finding of malice.

(Petition for Certiorari, at A11.)

In its motion for rehearing in the state appellate court, however, Hall abandoned its prior position that evidence of ill will alone cannot establish actual malice. Instead, Hall stated,

> Assignment 41.
>
> The Court of Appeals erred in holding that malice on the part of Hall's employees could be established by proof of ill will, coupled with other evidence.

(Motion for Rehearing for Appellants, at 36.) Hall thus began the shift to its present position that ill will is irrelevant.

Having failed to raise this new position seasonably, Hall is in no position to pursue it before this Court. *See, e.g., Radio Station WOW v. Johnson*, 326 U.S. 120, 128 (1945).

C. Evidence of ill will is relevant to the issue of actual malice.

On the merits, Hall's present position does not raise a substantial question for this Court. The notion that ill will is relevant to actual malice is inconsistent with common sense and with sound legal principles. Evidence of a speaker's ill will obviously bears upon the existence of "either deliberate falsification or reckless publication 'despite the publisher's awareness of probable falsity'." *St. Amant v. Thompson,* 390 U.S. 727, 731 (1968), *citing Curtis Publishing Co. v. Butts,* 388 U.S. 130, 153 (1967).

To be sure, ill will *alone* may not equate with actual malice. But that is far different from saying ill will is logically irrelevant. *See* Restatement (Second) of Torts § 580A, Comment d (1977) (Ill will does not "in itself" constitute actual malice, but it can "assist in the drawing of an inference that the publisher knew that his statement was false or acted in reckless disregard of its falsity."). Evidence of ill will shows that the speaker had a motive to lie about his victim. Though it may be neither necessary nor sufficient for a finding of actual malice, it certainly is relevant to the inquiry.[8]

IV. "Does the evidence support the jury's finding of actual malice?"

Hall states that an "independent review" will show that there was not enough evidence to support the jury's finding.

This issue, too, is not appropriate for review.

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8. Consider an analogy from criminal law: A criminal defendant's ill will toward a murder victim is not sufficient *in itself* to show that the defendant committed the murder. But surely it is relevant.

A. This is a restatement of another non-reviewable issue.

Though Hall states this as a separate issue (Petition for Certiorari, at 23-24), it is essentially a restatement of Hall's request for an "independent review." As discussed above, the issue of independent review was not raised seasonably in the Texas courts.

B. There is no conflict of decisions.

Any review of the voluminous record in this case turns solely on the particular facts involved. Consequently, it is meaningless to assert a conflict with decisions in other cases.

Hall does cite three cases that supposedly hold that motive is not relevant to issues of actual malice. *Fink v. Combined Communications Corp.*, 579 P.2d 1108 (Colo. Ct. App. 1984); *Burke v. Diener*, 190 N.J. Super. 382, 463 A.2d 963 (App. Div. 1983), *reversed*, 97 N.J. 465, 479 A.2d 393 (1984); *Williams v. Trust Co. of Georgia*, 140 Ga. App. 49, 230 S.E.2d 45 (1976). (*See* Petition for Certiorari, at 23.) None of these decisions is by a state court of last resort. Moreover, rather than hold that motive is irrelevant, they simply apply the (uncontroverted) rule that evidence of ill will is not in itself sufficient to establish malice.[9]

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9. Hall suggests that under this Court's *Bose* decision, it is irrelevant that the speakers of defamatory material do not tell the truth in court. (Petition for Certiorari, at 23-24.) At most, however, *Bose* held that under the facts of that case, the speaker's in-court "rationalization" did not establish in itself the presence of actual malice. 104 S.Ct. at 1966. Clearly, obstinate refusal to acknowledge the truth is relevant. *See, e.g.*, Golden Bear Distributing Systems of Texas, Inc. v. Chase Revel, Inc., 708 F.2d 944, 950 (5th Cir. 1983), *quoting* Restatement (Second) of Torts § 580A Comment d (1977) (refusal to retract might be relevant in showing recklessness at the time of publication).

C. There is sufficient evidence of malice.

The record is voluminous, and the evidence has been briefed extensively in the state courts. There should be no question as to the adequacy of the evidence of actual malice. Indeed, the court of appeals' opinion merely touches the tip of the evidentiary iceberg—which is understandable, given that there were seventeen different instances of defamation. In general, however, the evidence showed (1) most importantly, the speakers knew the truth as a matter of personal knowledge,[10] (2) they did not tell the truth, either at the time or in court, (3) they told different stories to different people, (4) they had substantial economic incentives to prevent Buck from taking his accounts elsewhere, (5) their personal ill will toward Buck provided a motive to lie about him, and (6) treatment of Buck provided a motive to lie about his performance at Hall. Other than actual admissions of knowing falsity or reckless disregard, there is little other evidence of actual malice that the record *could* contain. *See United*

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10. Language from *St. Amant* is instructive:

> The defendant in a defamation action brought by a public official cannot, however, automatically insure a favorable verdict by testifying that he published with a belief that the statements were true. The finder of fact must determine whether the publication was indeed made in good faith. Professions of good faith will be unlikely to prove persuasive, for example, where a story *is fabricated by the defendant, is the product of his imagination,* or is based wholly on an unverified anonymous telephone call. Nor will they be likely to prevail when the publisher's allegations are *so inherently improbable that only a reckless man would have put them in circulation.* Likewise, recklessness may be found where there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports.

390 U.S. at 732 (emphasis added). Note that unlike most media defendants, Hall is in no position to argue that it innocently relied on seemingly reliable information.

States v. Johnston, 268 U.S. 220, 227 (1925) "We do not grant a certiorari to review evidence and discuss specific facts.").

A NOTE ON THE DISPOSITION OF THIS PETITION

Hall points out that this Court has granted certiorari in *Greenmoss Builders, Inc. v. Dun & Bradstreet, Inc.,* 143 Vt. 66, 461 A.2d 414, *cert. granted,* ____U.S.____, 104 S.Ct. 389 (1983). (*See* Petition for Certiorari, at 11.) The issues in *Greenmoss* are (a) whether the *Gertz* rules—*i.e.,* that in the absence of actual malice, neither presumed actual damages nor punitive damages may be awarded—apply to defamation suits against non-media defendants, and (b) whether those rules apply where the speech is of a commercial or economic nature. 53 U.S.L.W. 3045.

Buck submits that *Greenmoss* provides no reason to defer disposition of the instant petition. Even if the *Gertz* rules applied to this type of situation, that would not affect this case because actual malice has actually been proved.[11]

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11. Significantly, falsity "has never been disputed" in *Greenmoss.* 461 A.2d at 415.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that three true and correct copies of the aforegoing Respondent's Brief in Opposition have been served on all parties required to be served by serving opposing counsel, Irving C. Stern, 1980 Post Oak Boulevard, Suite 1600, Houston, Texas 77056, by certified first class United States mail, postage prepaid, return receipt requested, all in accordance with Rule 28.3, on the _____ day of May, 1985.

STEPHEN D. SUSMAN